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Indiana Law Review

We are pleased to announce that Volume IX, 1975-76, will include the expanded special fall edition

THIRD ANNUAL SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

A comprehensive analysis of significant statutory and case law developments intended primarily to assist members of the Indiana Bar.

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Indiana Law Review

Volume 8

1974

Number 1

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*Appointed to replace Judge Allen Sharp on January 21, 1974.

**Deceased, October 21, 1974.

***Appointed to the Federal District Court on October 11, 1973; resigned from the Indiana Court of Appeals for the Third District on October 31, 1973.

Districts of the Indiana Court of Appeals



Indiana Law Review

Volume 8

1974

Number 1

Survey of Recent Developments in Indiana Law

The staff of the *Indiana Law Review* is pleased to publish its second annual Survey of Recent Developments in Indiana Law. This survey, combining a scholarly and practical approach to recent cases and statutes, emphasizes new developments in Indiana law. No attempt has been made to consider all cases decided or statutes enacted during the survey period. This survey covers the period from June 1, 1973, through May 31, 1974.

I. Foreword: Indiana Justice of the Peace Courts—Problems and Alternatives for Reform

David C. Campbell*

The weakness of local courts of limited jurisdiction is perhaps the most persistently identified failing of American court systems, and one that is long overdue for remedial action.'

The second annual *Survey of Recent Developments in Indiana Law* brings to the bench and bar enlightening discussion of the most important cases recently decided by the Indiana Supreme Court and Indiana Court of Appeals. Although the treated cases reflect the most significant developments in the substantive law, they represent an insignificant percentage of the total number of cases handled by Indiana courts. The majority of cases handled in Indiana consist of small civil claims, traffic offenses and minor criminal offenses which rarely, if ever, rise to the status of cases deserving treatment in the *Survey*. Yet these cases and the manner in which they are adjudicated are significant and deserving of comment.

*Executive Secretary, Indiana Judicial Study Commission. J.D., Indiana University, 1974. The views expressed herein are those of the author and should not be construed as either those of the Indiana Judicial Study Commission or of the *Indiana Law Review*.

'ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ORGANIZATION 19 (Tent. Draft, 1973).

Small claims, traffic offenses and minor criminal offenses are handled in Indiana by a category of courts designated as courts of limited jurisdiction. Within this category are municipal, city, town and justice of the peace courts.² The municipal court exists only in Marion county and consists of a single multi-judge court operating under the administration of a chief judge. Although there are approximately eighty-seven city courts now operating, their impact on the judicial process is most significant in the urban area of Lake county and in moderately urban areas such as Vigo and Delaware counties. Town courts have a relatively minor impact on the judicial system and there are currently only seventeen in operation. Consequently, excluding Lake and Marion counties, the majority of minor cases are handled by justice of the peace courts. In 1970 alone, justice courts processed an estimated 210,000 cases.³

The importance of justice courts to the entire judicial system cannot be underestimated. Merely by handling a high volume of cases, they free the general trial courts for more complex cases. Further, they are charged with adjudicating small claims and enforcing the traffic safety laws of the state. Justice courts are also important in a sense that is often overlooked. The majority of citizens of Indiana rarely become involved in judicial proceedings and, when they do, the case normally involves a minor civil, traffic or criminal matter docketed into a justice court. How that matter is handled determines the litigant's first and possibly only impression of the judicial process. Therefore, justice courts contribute to the development of public attitudes regarding the entire judicial system.⁴

Justice courts have a long history as part of the Indiana judicial system. The predecessor of the justice court was established under the Laws of the Northwest Territories in the late eighteenth century⁵ and evolved into the current system organized under the Constitution of 1852.⁶ As early as 1845, one commentator noted that the purpose of the Indiana justice court was "to give the suitor a cheap and easy method of obtaining a remedy in the smaller class of actions, without the embarrassment of legal forms, and generally

²IND. CODE § 33-6-1-1 (IND. ANN. STAT. § 4-5801, Burns 1968) (municipal courts); *id.* § 33-10-2-1 (IND. ANN. STAT. § 4-6006) (city and town courts); *id.* § 33-11-1-1 (IND. ANN. STAT. § 5-102) (justice of the peace courts).

³STAFF OF INDIANA JUDICIAL STUDY COMM'N, REPORT NO. 1—JUSTICE OF THE PEACE SYSTEM 29 (1971).

⁴*See generally* Weinshienk, *Limited and Special Jurisdiction*, in JUSTICE IN THE STATES 125 (W.F. Swindler ed. 1971); Note, *Small Claims in Indiana*, 3 IND. LEGAL F. 517 (1970).

⁵LAWS OF THE NORTHWEST TERRITORY 1788-1800, at 4 (T.C. Peace ed. 1925).

⁶IND. CONST. art. 7, § 14 (1852).

without the aid of professional assistance.”” The justice court remained relatively unchanged until removed from the constitution by the new judicial article of 1970.⁸ Although the purpose and philosophy underlying the justice courts has not been challenged, the effectiveness of justice courts in fulfilling that purpose has come under severe criticism. Generally, critics argue that concepts of judicial organization and administration adapted to meet eighteenth and nineteenth-century problems are not capable of solving twentieth-century problems. The Indiana General Assembly has reacted to this criticism and has limited the life of the justice of the peace system to January 1, 1976.⁹ For a number of sessions, the Assembly has been concerned with justice courts and has considered and rejected proposals ranging from retention of the current system with minor cosmetic changes to creation of a new statewide system of courts of limited jurisdiction. Because the 1976 deadline is rapidly approaching, the fate of the justice system and the method by which the Indiana judicial system will adjudicate small claims and enforce traffic laws rests with the 1975 General Assembly.

There are several problems inherent in the justice of the peace system which the legislature must address in addition to the problem of the structure or organization of any replacement system. One such problem is the fee system. Most justices retain a portion of the filing fee or costs as their personal compensation for presiding.¹⁰ In 1927, the United States Supreme Court held that, in a case in which charges are litigated, it is a denial of due process under the fourteenth amendment to subject the defendant's liberty or property to the judgment of a court having a direct personal or pecuniary interest in finding against a defendant.¹¹ Recently, the Court reaffirmed this position and also held that a trial *de novo* on appeal does not provide the defendant with the due process of law he should have received in the first instance.¹² The Indiana fee system has avoided constitutional attack because of a little recognized

⁷G. VAN SANTVOORD, *THE INDIANA JUSTICE* 10 (1845).

⁸Since the amendment of article 7 of the Indiana Constitution, approved on November 3, 1970, no constitutional provision is made for justice of the peace courts. However, as provided in IND. CONST. art. 7, § 20, such courts are to remain in existence “unless and until such courts are abolished or altered or such laws repealed or amended by an act of the General Assembly” IND. CODE § 33-11-21-1 (IND. ANN. STAT. § 5-123, Burns Supp. 1974) provides for the continued existence of the justice of the peace system until January 1, 1976.

⁹See note 8 *supra*.

¹⁰IND. CODE §§ 33-11-18-12, -13 (IND. ANN. STAT. §§ 5-1702, -1703, Burns 1968).

¹¹*Tumey v. Ohio*, 273 U.S. 510 (1927).

¹²*Ward v. Village of Monroe*, 409 U.S. 57 (1972).

statute providing for the justice's fee to be paid by the township in any criminal case in which the defendant is discharged.¹³ However, because many justices are encouraged to dispense justice for profit, it is doubtful whether the statute in fact assures due process. Nonetheless, beyond the constitutional complications of the fee system, and even beyond the potential for unscrupulous fee collection, lies the appearance of impropriety. By its nature the fee system creates an attitude of presumed prejudice.

Apparently to offset any inherent prejudice in the fee system, Indiana has established an annual fee retention maximum of \$4,500.¹⁴ However, any supposed benefit resulting from the limitation is offset by the negative effect the maximum has on the justice's desire to hear cases. With a \$4,500 maximum, once a justice hears 1,125 cases, the pecuniary incentive is removed. The only available study in Indiana correlating maximum fee retention with caseload indicated that the caseload of sixty percent of the justices surveyed substantially declined after the maximum caseload was reached.¹⁵

Further, there are no educational qualifications for the office of justice of the peace. The General Assembly has been concerned with this problem since 1957 when it attempted to limit the office either to attorneys, to justices who have completed a full term, or to persons who have successfully completed a supreme court examination.¹⁶ Since at that time the justice court was a constitutional office, the legislative qualifications were held unconstitutional.¹⁷ There are, therefore, no educational requirements for the office, and additionally there are no mandatory, and few voluntary, opportunities for a justice to obtain any legal education after assuming office. A 1970 survey revealed that only four percent of all justices were attorneys.¹⁸ However, since the justice is a judicial officer exercising judicial functions, it is clear that he should be knowledgeable in the law. In the context of a small claims civil case in which neither side is represented by counsel, it is the duty and function of the justice to protect the legal rights of both parties and to base his decision on the substantive law. Consequently, a working knowledge of the law is required. It is conceivable that a small claim in a justice court may involve a consumer dispute requiring the application of the Indiana Deceptive Sales Act, the Uniform Commercial Code,

¹³IND. CODE § 33-11-18-12 (IND. ANN. STAT. § 5-1702, Burns 1968).

¹⁴*Id.* § 33-11-18-3 (IND. ANN. STAT. § 5-106, Burns Supp. 1974).

¹⁵STAFF OF INDIANA JUDICIAL STUDY COMM'N, *supra* note 3, at 25. Twenty-eight percent of the justices surveyed reached the statutory maximum.

¹⁶*See* IND. CODE § 33-11-18-5 (IND. ANN. STAT. § 5-108, Burns 1968).

¹⁷*In re* Petition of the Justice of the Peace Ass'n, 237 Ind. 436, 147 N.E.2d 16 (1958).

¹⁸STAFF OF INDIANA JUDICIAL STUDY COMM'N, *supra* note 3, at 28.

the Uniform Consumer Credit Code, and the Federal Truth in Lending Regulations, as well as numerous other statutory and common law doctrines. Further, when one party is represented by counsel, a justice with inadequate legal training is often unable to grasp specific legal arguments or to adequately protect the legal rights of the non-represented party. This problem is as equally applicable to criminal cases as to search or arrest warrants issued by justices.¹⁹

Much of the legislative discussion in regard to reform of the justice courts has been concerned with the educational qualifications of justices. Under one proposal, judges of courts of limited jurisdiction would be required to be attorneys while, under another, a person would be qualified to serve if he passed a supreme court examination and attended an annual educational conference.²⁰ From the practical standpoint of avoiding the time and expense of examinations and conferences, the attorney requirement is clearly preferable. Further, since the goal of any educational requirement is to assure that the judge is trained in the law, that goal is better served by requiring that the judge be an attorney. The most effective way to obtain a trained judiciary is to require a solid formal legal education.

An additional category of problems associated with the current justice system concerns facilities and resources. It is the duty of the township trustee and township advisory board to provide a suitable courtroom and adequate supplies for the operation of the justice court.²¹ All too often, however, the courtroom is in the justice's home and the supplies consist of minimal necessities.²²

¹⁹Note, *Small Claims in Indiana*, 3 IND. LEGAL F. 517, 521 (1970), states: "This lack of legal training is reflected in the work of lay Justices and inclines them to look to the prosecuting officer for guidance in imposing sentence" The use of non-attorney justices in criminal cases has been held a violation of due process. *Gordon v. Justice Court*, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974). *Contra*, *Ditty v. Hampton*, 490 S.W.2d 772 (Ky. 1972), *appeal dismissed*, 414 U.S. 885 (1973).

²⁰*Compare* Ind. S. 40, 98th Gen. Assembly, 1st Sess. (1973), *with* Ind. H.R. 1065, 98th Gen. Assembly, 2d Sess. (1974).

²¹IND. CODE § 33-11-18-11 (IND. ANN. STAT. § 5-113, Burns 1968). The statute is mandatory; it requires the township trustee and advisory board to make provision for suitable facilities and supplies. The circuit judge is given authority to enforce the provision by mandate.

²²A recent survey of justices of the peace reported the following responses to a question regarding the location of courtrooms:

<i>Type of Building</i>	
<i>Where Court Located</i>	<i>Number of Responses</i>
Private Home	79
Office Building	54
City Hall	26

The problem of "kitchen justice" or lack of adequate facilities is primarily attributable to the failure of local support rather than to an absence of concern by local justices.²³ As long as justice courts are operated with the philosophy of making a profit for the township, rather than of servicing the people, the problem will remain.

Although the problems of compensation, qualifications and lack of adequate support pose serious obstacles to efficient and effective operation of justice courts, a clear failure of the system is apparent when subjected to traditional notions of judicial organization and administration. One perpetual problem plaguing the system is the absence of uniformity.²⁴ The system is designed to handle small civil claims and traffic cases. However, a large number of justice courts never hear civil cases and most devote little time to them. In conjunction with other factors, the failure of justice courts to exercise a uniform civil jurisdiction often leaves the small claimant without a remedy. The Indiana Judicial Study Commission directed the problem to the General Assembly in 1973, noting:

Presently, there is no readily accessible small claims court in Indiana. Justice of the Peace courts handle traffic cases as a general rule. The civil cases which are heard in JP court are generally of the collection variety. Thus, the litigant dissatisfied with consumer goods or involved in a dis-

Public Office Building.....	17
Police Station	7
Courthouse	7
Storefront	4
Other	4

STAFF OF INDIANA JUDICIAL STUDY COMM'N, REPORT NO. 2—JUSTICE OF THE PEACE SYSTEM, in INDIANA JUDICIAL STUDY COMM'N ANNUAL REPORT (1974) (based on 182 responses; discrepancies due to multiple responses).

²³*Id.* The following questions and responses generally indicate the degree of township support.

Question. Does the township assume the cost of providing a courtroom?

Yes	91
No	89
No Response	2
Total	182

Question. Does the township make suitable provision, and appropriate sufficient money, for the purchase of necessary supplies and equipment for the maintenance of your courtroom and conducting of business in your court?

Yes	91
No	89
No Response	2
Total	182

²⁴One example of the absence of uniformity is illustrated by the variance in township support of resident courts. See note 23 *supra*.

pute with a merchant or other citizen is in a precarious position. Attorneys are unwilling to accept the cases due to the small monetary return. If they do accept the case, the fee would dissipate a large amount of the damages. If the claimant resorts to JP court the justice of the peace in all probability is untrained in the law and incapable of rendering justice although he may strongly desire to do so. . . . Thus the sad fact is that although great inroads have been made in the area of consumer protection laws, their protection is largely nothing more than window dressing due to the fact that the present court system is not set up to serve the public.²⁵

The justice court, the "people's court," fails to provide Indiana citizens with a uniform small claims forum.

In addition to the problem of exercise of uniform jurisdiction, the justice of the peace system is characterized by an extreme case-load imbalance between courts and a perpetuation of courts on an arbitrary basis rather than on a demand basis.²⁶ In essence, the system is not responsive to local demand for court services and cannot efficiently satisfy that demand.

The problems inherent in the current justice of the peace system are known. The real question concerns the solution of those problems and the ramifications of the solution on the entire judicial system. There are three available general alternatives for reform of the justice of the peace system. These are to retain the current system with minor modification in selected areas, to replace the current minor courts with a more sophisticated, statewide, and uniform tier of courts of limited jurisdiction, or to abolish the existing minor courts and expand the general trial courts to absorb the litigation.

The success of the first alternative would depend entirely upon the degree of modification undertaken.²⁷ At the least, the fee system must be abolished, qualifications for justices must be required and adequate financial support must be provided. Such modifications, while adding a degree of legitimacy to justice courts, cannot without significant structural change insure the uniform exercise of civil jurisdiction or the efficient distribution of judicial manpower, or render the system susceptible to modern techniques of court administration. In short, minor modifications would work only cosmetic rather than substantive changes. Therefore, since

²⁵INDIANA JUDICIAL STUDY COMM'N, EXPLANATION AND FULL TEXT OF THE COUNTY COURT BILL 8 (1973).

²⁶See generally STAFF OF INDIANA JUDICIAL STUDY COMM'N, *supra* note 3.

²⁷See generally Ind. H.R. 1065, 98th Gen. Assembly, 2d Sess. (1974); Ind. S. 81, 98th Gen. Assembly, 2d Sess. (1974).

one basic failure of the justice of the peace system is its inability to provide an adequate and uniform small claims service to the public, basic structural and functional changes are required.

To achieve necessary reform of the justice of the peace system, the system should be abolished and either be replaced by a modern system of courts of limited jurisdiction or have its work assumed by the general trial courts. The most recently proposed replacement system, the County Court System, was introduced into the legislature in 1973.²⁸ The County Court System incorporated a statewide structure broken down into multi-county districts for the purposes of administration. Judges were required to be attorneys and to serve full time and were to be selected under a merit rather than an election system. Each judge would be assigned a county or counties depending on the need for his services and would be subject to temporary transfer to any other county in the district to compensate for caseload variance. This system, under the direction of a chief judge, was designed to promote equal distribution of services and efficient distribution of resources. The county courts' jurisdiction extended to minor criminal, traffic, and small claims matters. A special small claims procedure was included which would dispense with the technical rules of pleading, practice and evidence, would direct judgment on the basis of substantive law rather than procedural irregularities, and would encourage the simple, expeditious litigation of a small claim without the aid of an attorney. As were the proposals urging selective modification of the present system, the county court proposal was rejected by the legislature.²⁹

The county court proposal represented the clearest alternative to the current system of courts of limited jurisdiction. It presented a modern and comprehensive approach to judicial reform. The proposal, however, was not without critics who challenged the workability, cost, availability of judges and, of course, the philosophy of merit selection. Currently, one of the principal criticisms of the county court proposal is that it perpetuates a two-tier system of trial courts. Maintaining two levels of trial courts, one of general and one of limited jurisdiction, encourages duplication of effort, facilities, administration and costs and, at the same time, inhibits potential flexibility in the system. While the county court

²⁸Ind. S. 40, 98th Gen. Assembly, 1st Sess. (1973). See INDIANA JUDICIAL STUDY COMM'N, EXPLANATION AND FULL TEXT OF THE COUNTY COURT BILL (1973).

²⁹The county court proposal passed the senate in both sessions of the 98th General Assembly. However, in the first session it was not reported out of the house committee and, in the second, the substantive portion of the bill was not reported out of the conference committee.

proposal recognized and encouraged transfer of judges along geographic lines, it potentially inhibited temporary transfer from one jurisdictional level to another. Thus, a county court judge temporarily inundated with work could not call upon a less busy circuit judge in the same county for assistance. Further, a two-tier trial court system creates, in effect, a judicial pecking order in trial courts with lower status being accorded to those judges hearing the less glamorous cases. According to a recent analysis of trial court organization:

Perhaps most important, the differentiation of the trial court of limited jurisdiction expresses an implicit differentiation in the quality of justice to be administered. It induces a sense of isolation and inferiority among the judges and court personnel who are called upon to perform one of the judiciary's most difficult and frustrating tasks—individualizing justice in the unending stream of undramatic cases that constitute the bulk of the court system's work.³⁰

The county court proposal is a viable alternative for reform of the justice of the peace system. It faces directly the problems of justice courts and attempts to work a lasting solution. Although initially costly, the expense is reasonable in light of additional services provided. As with any new system of this significance, there would be some practical problems of implementation. However, through the district administration technique, the system has a built-in mechanism for adaptation and problem-solving which encourages, at the least, a response to problems that may arise.

The debate over the county court proposal, however, should center upon whether Indiana, because of the immediacy of the justice of the peace problem, should adopt the proposal and accept a two-tier trial court organization or seek a short term solution and work toward eventual unification of all trial courts into one tier. The argument that Indiana could adopt the county court proposal and still work toward eventual unification of the trial courts into a single tier ignores the lesson to be learned from the lengthy reform process of the justice of the peace system. The lesson is that once a system is adopted it tends to become institutionalized and entrenched to the degree that it creates a momentum for self preservation, rejecting pressures for change, even pressures from the same source that initially created it. To adopt the county court system with the intention of later replacing it with a single tier of trial courts might create political barriers similar to those

³⁰ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION, *supra* note 1, at 9.

encountered in the process of reforming the justice courts. Therefore, the better approach is to decide now whether Indiana should accept a two-tier trial court system for the foreseeable future or should attempt, in the immediate future, the unification of all courts below the appellate level. By making that decision in regard to reforming justice courts, future similar problems encountered in reforming court systems can be mitigated or alleviated entirely.

A recent proposal, termed the docket-commissioner system, involving general trial court assumption of all of the work of courts of limited jurisdiction, would eliminate many of the problems associated with the justice of the peace courts and would preserve the trial court system for eventual unification into a single level. However, the obvious problem with this alternative is assuring adequate judicial service in the areas of small claims, traffic enforcement and misdemeanors without overburdening existing circuit and superior courts. The proposed solution, currently being studied, is to provide existing trial courts with additional resources, specialized procedures for small claims and traffic cases, and additional personnel in the form of commissioners or referees and clerical assistants. Small claims cases would be handled in a manner similar to the county court proposal with the emphasis on allowing an individual to litigate his own claim in a simple, inexpensive and expeditious manner. Most traffic cases would be handled through a traffic violations bureau and a defendant who desired to plead guilty could pay the applicable fine without having to appear in court.³¹ The use of the traffic violations bureau and specialized procedures for expediting small claims would, in the smaller counties, reduce the caseload to manageable proportions.

Most courts, however, will find it necessary to obtain additional staff support for efficient disposition of the increased caseload. The docket-commissioner system envisions giving the circuit or superior court judge the discretion to hire a commissioner to assist in the disposition of small claims, traffic and misdemeanor cases. The commissioner would be supervised by the judge and should serve at the judge's pleasure. His duties should be discretionary with the appointing judge but limited to the specialized dockets. Thus, by providing the judge with the proper tools and the discretion to adapt them to local needs, the general trial courts theoretically should be able to assume the workload of the courts of limited jurisdiction with minimal implementation problems.

The docket-commissioner system would be advantageous in that it would eliminate many of the problems inherent in the

³¹See IND. CODE § 9-4-7-10 (Burns 1973).

justice of the peace system and encourage a one-tier trial court system in Indiana. It would be more economical than the county court proposal since an entirely new system would not be necessitated and duplication in many areas could be avoided. Also, all dockets and commissioners would be supervised by the appointing judge who would have the discretion and flexibility to provide necessary judicial services in response to local demand. Further, the proposal falls politically in the middle of the road between cosmetic change of the present system and the county court proposal. Thus it may be more successful in the legislature.

The county court proposal and the docket-commissioner system pose clear and reasonable alternatives to the present system of courts of limited jurisdiction.³² Their relative advantages and disadvantages are apparent but, given the period of implementation distortions, each should work into a smooth system for adjudicating the "less glamorous" cases. Regardless of which system is adopted, or even if only minor changes in the current system are enacted by the General Assembly, the foremost consideration should be how to best provide necessary judicial service to all Indiana citizens. The incorporation of a viable small claims forum in which a claimant may litigate his own claim in a simple, inexpensive and expeditious manner is essential. Almost of equal importance is the consideration that Indiana's traffic safety program should be enhanced through the efficient and uniform disposition of traffic cases. The county court proposal and the docket-commissioner proposal could provide the structure for operation of these important judicial functions. The combination of qualified judges, increased support, adequate facilities, and a competent administration removed from the taint of inadequacy associated with many courts in the existing system, would promote the development of a highly respected process for the adjudication of minor cases.

This discussion has focused, in a general way, upon some of the problems associated with Indiana's current practice of handling minor cases and has highlighted some of the suggested alternatives for reform. This general approach is required because all the arguments advanced, theories proposed, and great quotations made in reference to justice of the peace courts are too numerous to include. In conclusion, however, there is one specific concept which should

³²Both the county court proposal and the specialized docket approach are currently utilized to a limited degree in Indiana. A county court has been in operation in Hancock county since 1972, and one will begin operation in Hendricks county in 1975. *Id.* § 33-5.5-1-1 (IND. ANN. STAT. § 4-6401, Burns Supp. 1974) (Hancock); *id.* § 33-5.5-2-1 (IND. ANN. STAT. § 4-6501) (Hendricks). A specialized docket for small claims currently is in operation in the Brown circuit court. *Id.* § 33-4-1-7.1 (IND. ANN. STAT. § 4-335).

be remembered. The courts that handle the "less glamorous" cases, the everyday cases, are the courts closest to the people. These courts should be designed to serve the people and to handle their complaints because the people deserve no less.

II. Administrative Law

Rodney Taylor*

A. Administrative Findings of Fact

*Transport Motor Express, Inc. v. Smith*¹ was the most significant administrative law case decided in the past year. The Indiana Supreme Court reversed the court of appeals² and sustained an award of workmen's compensation benefits by the Industrial Board. The significance of *Transport Motor III* is its effect on the determination of the proper scope of judicial review of administrative action. Although the supreme court noted that the court of appeals "correctly stated the law, but . . . failed to apply the law in the case at bar,"³ the decision can be more accurately described as a relaxation of the standard, developed by the court of appeals in *Transport Motor II*, regarding review of agency findings of fact.

The court of appeals, in *Transport Motor II*, sought to establish a minimum level of specificity with regard to the findings of disputed issues of fact made by state administrative agencies.⁴ The thrust of the opinion was that the agency should state "all relevant and underlying or basic facts."⁵ For example, in a workmen's compensation case, if the Industrial Board awards benefits to the claimant, "minimum specificity"⁶ would require that the Board explain why the claimant's evidence tends to show facts which prove the

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¹311 N.E.2d 424 (Ind. 1974) [hereinafter referred to as *Transport Motor III*].

²289 N.E.2d 737 (Ind. Ct. App. 1972) [hereinafter referred to as *Transport Motor II*]. In *Transport Motor Express, Inc. v. Smith*, 279 N.E.2d 262 (Ind. Ct. App. 1972) [hereinafter referred to as *Transport Motor I*], the court of appeals remanded the case to the Industrial Board, stating that its findings of fact were insufficient, and directed that additional findings of fact be made so that the court could intelligently review the award.

³311 N.E.2d at 425.

⁴See *Administrative Law, 1973 Survey of Indiana Law*, 7 IND. L. REV. 2, 6-11 (1973) [hereinafter cited as *1973 Survey of Indiana Law*], in which *Transport Motor I* and *II* are extensively discussed.

⁵289 N.E.2d at 747.

⁶*Id.* at 746.

elements of claimant's case and why the opposing party's evidence fails to show facts which disprove the elements of the claimant's case.⁷ It was felt that only by requiring such findings could the reviewing court avoid the necessity of making presumptions as to whether the Board reached certain results in its weighing of the evidence.⁸ The court of appeals relied extensively upon secondary authority⁹ criticizing administrative agency findings that are conclusionary in nature¹⁰ or that merely summarize the evidence presented.¹¹ In essence, the Board, and not the reviewing court, was required to supply the "factual theory" underlying the Board's actions.¹²

The supreme court's decision in *Transport Motor III* seems to signal a return to the pre-*Transport Motor I* standard of judicial review.¹³ The decision can be read as standing for the proposition that a reviewing court may imply factual inferences and supply the factual theory underlying the administrative agency's action.¹⁴ This runs counter to the intent of *Transport Motor II*. The supreme court felt that the lower court was confused when it used "the terminology 'factual inferences' when . . . actually referring to legal conclusions which may be drawn from the facts as stated by the Industrial Board."¹⁵ Impliedly rejecting the second element of "minimum specificity," the court held that the reviewing court should not concern itself with "facts" argued below but omitted from the Board's findings.¹⁶

The dissenting opinion stated that three elements were missing from the findings of fact submitted by the Industrial Board. In substance, the dissent complained that the findings did not specify the facts which produced the basis for the Board's award, the factual inferences drawn from such facts, or the factual theory underlying the Board's determination. Such factual theorizing was

⁷*Id.* at 747-49. See generally 1973 *Survey of Indiana Law* 9.

⁸289 N.E.2d at 747.

⁹2 F. COOPER, *STATE ADMINISTRATIVE LAW* 477-78 (1965); 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 16.01, at 436 (1958).

¹⁰*Accord*, *Public Serv. Comm'n v. Fort Wayne Union Ry.*, 232 Ind. 82, 111 N.E.2d 719 (1953); *Wabash Valley Coach Co. v. Arrow Coach Lines, Inc.*, 228 Ind. 609, 94 N.E.2d 753 (1950).

¹¹*Accord*, *American Transp. Co. v. Public Serv. Comm'n*, 239 Ind. 453, 154 N.E.2d 512 (1958).

¹²311 N.E.2d at 429 (DeBruler, J., dissenting).

¹³See, e.g., *Bell v. Goody, Goody Prod. Co.*, 116 Ind. App. 181, 63 N.E.2d 147 (1945); *Goodwin v. Calumet Supply Co.*, 107 Ind. App. 487, 23 N.E.2d 602 (1939); *Payne v. Wall*, 76 Ind. App. 634, 132 N.E. 707 (1921).

¹⁴311 N.E.2d at 428-29 (DeBruler, J., dissenting).

¹⁵*Id.* at 427.

¹⁶*Id.* at 428. But cf. 1973 *Survey of Indiana Law* 9.

deemed by the dissent to be solely the province of the Board and not a function of the reviewing court.¹⁷

In *Indiana State Board of Tax Commissioners v. Pappas*,¹⁸ the court of appeals held that a trial court is prohibited from substituting its judgment for that of the Indiana State Board of Tax Commissioners. After a determination that the Board's action with regard to the assessed value of respondent's property was "arbitrary, capricious or unlawful,"¹⁹ the trial court assessed the property on its own volition. In reversing the trial court's action, the appellate court found that the lower court exceeded its authority, since the applicable statute²⁰ required the matter to be remanded to the Board for reassessment. The trial court's scope of review is limited to the determination of whether there was sufficient evidence to sustain the Board's findings and whether there was an abuse of discretion by the agency.²¹

In another recent decision, somewhat similar to *Pappas*, the court of appeals clarified another aspect of the relationship between the determining agency and the reviewing trial court. In *Indiana Alcoholic Beverages Commission v. Johnson*,²² the court held that the Commission, not the trial court, determines the issues of fact presented. Furthermore, it was held that the reviewing trial court cannot reevaluate conflicting evidence appearing in the record if there is substantial evidence on the record as a whole to support the Commission's findings.²³ The issue arose when the trial court set aside a Commission order rejecting renewal of respondent's liquor permit. The lower court reevaluated the evidence presented to the Commission and found, in direct contrast to the Commission's findings, that respondent's tavern had a "high and fine reputation."²⁴ The court of appeals found that the trial court had ignored substan-

¹⁷311 N.E.2d at 428-29 (DeBruler, J., dissenting).

¹⁸302 N.E.2d 858 (Ind. Ct. App. 1973).

¹⁹*Id.* at 860.

²⁰IND. CODE § 6-1-31-4 (Burns 1972) provides as follows:

Whenever a final determination by the state board of tax commissioners regarding the assessment of any real or tangible personal property which is taxable under this act . . . or any prior or other act, shall have been vacated, set aside or adjudged null and void pursuant to the finding, decision or judgment of any court of competent jurisdiction, the matter of the assessment shall, in all instances, be remanded to the state board of tax commissioners for reassessment and further proceedings in accordance with law.

²¹*Department of Financial Inst. v. State Bank*, 253 Ind. 172, 252 N.E.2d 248 (1969); *Public Serv. Comm'n v. City of Indianapolis*, 235 Ind. 70, 131 N.E.2d 308 (1956).

²²303 N.E.2d 64 (Ind. Ct. App. 1973).

²³*Id.* at 68.

²⁴*Id.* at 66.

tial evidence presented to the Commission and had arbitrarily substituted its judgment for that of the Commission. In support of its decision reversing the trial court, the appellate court noted that "[a]dministrative fact finding is a sacred cow . . . [and] that weighing evidence is forbidden fruit to the reviewing court."²⁵

The court of appeals then held that the trial court was in error when it ordered the Commission to "forthwith issue" a renewal permit to the applicant.²⁶ The court held that the express intent of the Administrative Adjudication Act²⁷ was to limit the reviewing court's authority such that, after a determination that the agency's action was contrary to law, the court's only power is to remand for further proceedings. Under the Act, the court may compel agency action by direct order only after the agency has withheld or unreasonably delayed the redetermination of the case.²⁸ Absent such action by the agency, the trial court lacks the authority to compel agency action as part of the initial review.²⁹

It is generally held that an agency hearing officer "occupies an inferior position; and that the agency, acting through its staff employee, may redetermine de novo the facts found by the hearing officer and rewrite his proposed decision."³⁰ This proposition was reaffirmed by the Indiana Court of Appeals in *Odle v. Public Serv-*

²⁵*Id.* at 68.

²⁶*Id.* at 69.

²⁷IND. CODE § 4-22-1-18 (Burns 1974) provides in pertinent part:

On . . . judicial review, if the agency has complied with the procedural requirements of this act, and its findings, decision or determination is supported by substantial, reliable and probative evidence, such agency's finding, decision or determination shall not be set aside or disturbed.

If such court finds such finding, decision or determination of such agency is:

(1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or

(2) Contrary to constitutional right, power, privilege or immunity; or

(3) In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or

(4) Without observance of procedure required by law; or

(5) Unsupported by substantial evidence,
the court may order the decision or determination of the agency set aside. The court may remand the case to the agency for further proceedings and may compel agency action unlawfully withheld or unreasonably delayed.

²⁸*Id.*

²⁹303 N.E.2d at 69.

³⁰1 F. COOPER, STATE ADMINISTRATIVE LAW 337 (1965). See generally 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 10.04 (1958).

ice Commission.³¹ The court held that fact-finding and decision-making powers, with regard to certificates of public convenience and necessity, reside solely in the Commission. A hearing examiner's findings and suggested order are advisory only and may be altered or otherwise modified by the Commission.³²

B. Procedural Aspects of Administrative Rulings

1. Constitutional Principles

Significant developments in administrative procedure centered around four decisions. In *King v. City of Gary*,³³ a policeman was suspended from the police force by the Gary Police Civil Service Commission for attending a gaming house and for other conduct unbecoming an officer. On appeal to the Indiana Supreme Court from a decision of the trial court affirming the suspension, the appellant-policeman presented three contentions: (1) the Commission denied him due process by improperly limiting the scope of his cross-examination of a witness, (2) the Commission denied him equal protection in that it failed to punish other policemen for alleged acts of misconduct and, by such failure, was discriminatorily punishing him, and (3) the trial court erroneously failed to order an exchange of the names of witnesses and the general nature of the expected testimony of each as provided under Indiana Rule of Trial Procedure 16.

In the majority opinion, Justice Givan first addressed himself to the question of the discretion granted the Commission to control the scope of cross-examination in disciplinary proceedings. He stated that, since the matters about which the appellant sought to question the witness would have only reiterated a previously admitted challenge to the witness' credibility, the Commission could properly limit the scope of cross-examination to exclude the further inquiry as being unproductive. On the second issue, Justice Givan held that the Commission was not engaging in invidiously discriminatory prosecution by failing to punish other policemen against whom charges of alleged acts of misconduct had been lodged by appellant. To hold otherwise would "make it impossible for a Commission [which] had operated inefficiently in the past to clean up its operation or increase its efficiency."³⁴ Moreover, even if the Commission had neglected its duty to prosecute all misconduct, such neglect would "be no bar to prosecuting a disciplinary action

³¹297 N.E.2d 453 (Ind. Ct. App. 1973).

³²See IND. CODE § 8-2-7-6 (Burns 1973).

³³296 N.E.2d 429 (Ind. 1973).

³⁴*Id.* at 431.

against the appellant for his misconduct.”³⁵ On the third issue, Justice Givan ruled that, since the appellant was complaining about the testimony of two witnesses whom he had first called at trial, he could not thereafter complain if the city subsequently called the same witnesses, without first notifying appellant, to pursue matters raised in the first examination. Not only was the trial court absolved of abuse of discretion, but Trial Rule 16 was found not applicable when appellant first called the witnesses.³⁶

*City of Mishawaka v. Stewart*³⁷ likewise involved an appeal from disciplinary action taken by an administrative board.³⁸ A

³⁵*Id.*

³⁶The issue was not presented on appeal as to whether the two witnesses should have been allowed to testify at the trial. The scope of judicial review of administrative findings of fact does not permit a reviewing court to examine anew the merits of the underlying factual controversy adjudicated in the administrative proceeding. The reviewing court is, instead, limited to an inquiry into (1) whether the action of the administrative body was arbitrary, capricious, fraudulent or otherwise illegal, (2) whether the administrative board exceeded its authority, and (3) whether there is substantial evidence to support the administrative findings of fact. *See Evansville v. Nelson*, 245 Ind. 430, 199 N.E.2d 703 (1964). Despite the fact that they had not appeared before the Commission, these two witnesses testified at the trial as to the merits of the charges against the appellant-policeman. This clearly exceeded the proper scope of judicial review and this testimony should not have been admitted at the trial.

It is possible that the trial court misconstrued the meaning of the procedural statute, IND. CODE § 18-1-11-3 (IND. ANN. STAT. § 48-6105, Burns Supp. 1974), wherein it states that a trial court reviewing administrative disciplinary proceedings shall hear the appeal “de novo on the issues.” The use of the phrase “de novo” does not authorize the trial court to expand its scope of judicial review to admit new facts not before the administrative body. It merely authorizes the trial court to review the administrative actions within a new framework of issues, although limited to the same facts as found by the agency. *See, e.g., City of Washington v. Boger*, 132 Ind. App. 192, 176 N.E.2d 484 (1961). *See also Kinzel v. Rettinger*, 277 N.E.2d 913 (Ind. Ct. App. 1972).

³⁷310 N.E.2d 65 (Ind. 1974).

³⁸*Id.* at 68. The court was presented with the question of which of two statutory procedures was sufficient to perfect a judicial review of administrative agency actions. The court held that the motion to correct errors, provided under Trial Rule 59(G), superseded the requirement of filing a petition for rehearing with the administrative agency, as provided under IND. CODE § 18-1-11-3 (IND. ANN. STAT. § 48-6105, Burns Supp. 1974). This statute provided that the filing of a petition for rehearing would stay the judgment of a reviewing court pending an administrative decision on the petition. This procedure was intended to be used in lieu of an appeal from a trial court judgment since the statute also provided that the judgment of the trial court was final and no appeal therefrom was allowed. However, the Indiana Supreme Court had ruled in *City of Elkhart v. Minser*, 211 Ind. 20, 5 N.E.2d 501 (1937), that an appeal to the supreme or appellate court is always allowed, notwithstanding express statutory language to the contrary. Thus, the petition for rehearing was held to no longer serve a useful purpose.

tenured fireman was dismissed for having knowingly received stolen property. The circuit court ordered the fireman reinstated on the ground that he was denied due process of law, because the city attorney, in the administrative hearing before the Board of Public Works and Safety, acted both as the advocate of the city and as a member of the Board. Justice Prentice stated on behalf of a bare majority of the court that, despite the fact that the city attorney was obligated under two separate statutes to act as both advocate and member of the Board,³⁹ the principles of due process, as enunciated by the United States Supreme Court in *Boddie v. Connecticut*,⁴⁰ require the city attorney to decline participation as a fact finder on the Board when he has first acted as counsel for an interested party.

The court reasoned that tenure rights are to be legally protected as if they were contract or property rights⁴¹ and that such rights are entitled to protection by both state and federal due process provisions. Though administrative proceedings are not required to be conducted in accordance with the standards demanded of courts, it is indisputable that "[t]here are . . . standards below which we should not go . . . [and] [t]hese standards . . . should be at the highest level that is workable under the circumstances."⁴² The court noted that this principle, coupled with the binding nature of administrative findings of fact when supported by substantial evidence, demands that a "strict test of impartiality be applied to the fact finding procedure."⁴³ Not only must such procedures comport with due process requirements but even the mere appearance of impropriety must be avoided.⁴⁴

This result is not dependent upon the possibility that the vote cast by a compromised administrative fact finder be the deciding vote. There is "no way which we know of whereby the influence of one upon the others can be quantitatively measured."⁴⁵ It is sufficient that there be dual participation by one individual, or a number of individuals so closely connected as to represent indistinguishable

³⁹IND. CODE § 18-1-6-13 (IND. ANN. STAT. § 48-1801, Burns 1968) requires the city attorney to represent the city in proceedings before administrative bodies. *Id.* § 18-2-1-4.2 (IND. ANN. STAT. § 48-1215, Burns Supp. 1974) requires the city attorney to be a member of the Board of Public Works and Safety.

⁴⁰401 U.S. 371 (1971).

⁴¹*Accord*, *State ex rel. Felthoff v. Richards*, 203 Ind. 637, 180 N.E. 596 (1932).

⁴²310 N.E.2d at 68.

⁴³*Id.* at 69.

⁴⁴ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule No. 9-101.

⁴⁵310 N.E.2d at 70, *quoting from* *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970).

interests, in order to make out a prima facie case of a due process violation in an administrative proceeding. To this extent, the majority opinion expressly overrules *Guido v. City of Marion*,⁴⁶ decided just two years ago.

The dissent of Chief Justice Arterburn, in which he was joined by Justice Givan, focused on the standards to be observed in administrative proceedings that would be consistent with the city's need to conduct its business unfettered by unreasonable restraints. He concluded that the dual participation of the city attorney did not amount to such a denial of due process as would warrant reversing the Board on its findings of fact, especially since the findings were supported by substantial evidence on the record, a fact conceded by the majority. The Chief Justice would have required the fireman to show, in addition, that the city attorney was actually biased.⁴⁷ Absent such a showing, he concluded, the statutory provision that, on appeal, the decision of the Board is to be deemed "*prima facie* correct"⁴⁸ should be interpreted to include a presumption that no procedural due process violations exist.

In *State ex rel. Todd v. Hatcher*,⁴⁹ a third appeal from administrative disciplinary proceedings, the Indiana Supreme Court construed two Indiana statutes regulating the disciplinary procedures affecting firemen and policemen and found them to be in irreconcilable conflict. The Board of Public Works and Safety indefinitely suspended the appellant-fireman without calling any witnesses or receiving and transcribing any testimony. The Gary Fire Civil Service Commission amended the Board's findings so as to provide a determinate suspension. Appellant sought relief from the judgment of the trial court affirming the Commission's action.

⁴⁶280 N.E.2d 81 (Ind. Ct. App. 1972). The court of appeals held in *Guido* that no violation of procedural due process was demonstrated when the attorney representing the city attempted to persuade the Board, a member of which was the attorney's immediate superior, as to Guido's guilt. The court said, however, that determining guilt or innocence was not the Board's duty. The Board was instead merely to determine the facts concerning Guido's fitness to serve as a police officer. Therefore, no conflict of interest was shown.

⁴⁷It was not clear whether Chief Justice Arterburn would have also required a showing that the city attorney's bias was prejudicial to the fireman. A necessary implication of a showing of prejudice is that the prejudice must constitute such an inherent defect in the administrative proceedings as to amount to a prima facie denial of due process.

⁴⁸IND. CODE § 18-1-11-3 (IND. ANN. STAT. § 48-6105, Burns Supp. 1974).

⁴⁹301 N.E.2d. 766 (Ind. Ct. App. 1973).

Appellant contended that the Commission's actions were in violation of Indiana Code sections 19-1-37.5-7⁵⁰ and 18-1-11-3.⁵¹ Without precisely specifying appellant's objections, the lower court noted a manifest conflict between these two statutes. The issue presented was whether the hearing provisions of the civil service statute had been superseded by the fire and police force statute. A precise reading of the two statutes revealed that the civil service statute provides for removal only after an opportunity for a hearing has been afforded; however, the fire and police force statute provides for suspension pending confirmation by the regular appointing power and for a hearing by the Commission after suspension. The statutes provide for hearings before different administrative bodies. The court concluded that, because of the conflict, the "former and more generally applicable statute must yield to the provisions of the latter."⁵²

Having concluded that the fire and police force statute was controlling, the court sought compliance with its provisions in the records of both agencies. Appellant contended that the Commission

⁵⁰IND. CODE § 19-1-37.5-7 (IND. ANN. STAT. § 48-6249h, Burns Supp. 1974) [hereinafter referred to as the civil service statute] provides in pertinent part:

No person in the classified civil service who shall have been permanently appointed or inducted into civil service under the provisions of this chapter . . . shall be removed, suspended, demoted or discharged except for cause, and only upon the written accusation of the appointing power, or any citizen or taxpayer, a written statement of which accusation, in general terms, shall be served upon the accused, and a duplicate filed with the commission. The chief of the fire department may suspend a member pending the confirmation of the suspension by the regular appointing authority under the chapter which must be within three [3] days. Any person so removed, suspended, demoted or discharged, may, within ten [10] days from the time of his removal, suspension, demotion, or discharge, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation.

⁵¹*Id.* § 18-1-11-3 (IND. ANN. STAT. § 48-6105) [hereinafter referred to as the fire and police force statute] provides in pertinent part:

Every member of the fire and police forces, including police radio operators and police signal and fire alarm operators, appointed by the mayor, the commissioners of public safety or the board of metropolitan police commissioners, shall hold office until they are removed by said board. They may be removed for any cause other than politics, after written notice is served upon such member in person or by copy left at his last and usual place of residence, notifying him or her of the time and place of hearing, and after an opportunity for a hearing is given, if demanded, and the written reasons for removal shall be entered upon the records of such board.

⁵²301 N.E.2d at 769. *See generally* Payne v. Buchanan, 238 Ind. 231, 148 N.E.2d 537 (1958); State v. Doversberger, 288 N.E.2d 585 (Ind. Ct. App. 1972).

had failed to timely file a transcript of the proceedings below with the trial court, thus rendering such proceedings void and entitling him to judgment as a matter of law.⁵³ The court rejected this contention and noted that, in *Hamilton v. City of Indianapolis*,⁵⁴ it had been previously held that it was not essential that the provisions of a statute which refer to the time limits for filing a transcript be strictly complied with, provided that such transcript is filed in time to be of service to all interested parties.

Appellant next argued that the procedures prescribed in the fire and police force statute violated the due process requirements of the federal and state constitutions.⁵⁵ More specifically, the appellant argued that he was entitled to a hearing before the implementation of any disciplinary action. The court rejected this argument by referring to *Cafeteria Workers v. McElroy*,⁵⁶ which held that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."⁵⁷ Moreover, the court reasoned that the public interest could not tolerate incompetent fire and police personnel. The public interest would be seriously jeopardized if incompetents were permitted to continue their employment pending disposition of charges leveled against them.⁵⁸

The *Todd* decision reaffirms that, while the requirements of due process are applicable to administrative proceedings, the procedural safeguards to be observed can, nonetheless, be tailored to the individual circumstances of particular administrative actions.⁵⁹

2. Statutory Construction

*Ball Stores, Inc. v. State Board of Tax Commissioners*⁶⁰ involved the applicability of statutory notice of appeal provisions to administrative proceedings. The taxpayer appealed to the circuit court from a Board determination of a tax assessment. The circuit court dismissed the complaint for failure to give timely notice of

⁵³301 N.E.2d at 770.

⁵⁴116 Ind. App. 342, 64 N.E.2d 303 (1964). This case involved a suit for reinstatement by a member of the Indianapolis Police Department on the grounds that his dismissal was capricious, fraudulent and illegal.

⁵⁵U.S. CONST. amend. XIV, § 2; IND. CONST. art. 1, §§ 12-13.

⁵⁶367 U.S. 886 (1961). This was an action to compel the return of an employee's identification badge so that the employee could enter a military installation and resume work.

⁵⁷*Id.* at 895.

⁵⁸*Accord*, *McElroy v. Trojak*, 21 Misc. 2d 145, 189 N.Y.S.2d 824 (Sup. Ct. 1959) (an action against the chief of police seeking the revocation of an order of suspension).

⁵⁹*See also* *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁶⁰307 N.E.2d 106 (Ind. 1974).

the appeal to the Board under the relevant statute.⁶¹ Judge Robertson, writing for the court of appeals, held that, if the thirtieth day after the Board gave notice of its determination fell on a Sunday, and the notice of appeal, mailed on the preceding Thursday, was not received by the Board until the following Monday, the taxpayer had failed to comply with the thirty day time limit for notice of appeal. In so holding, the court concluded that the trial rules are not applicable to proceedings before administrative agencies, nor are they applicable to proceedings requisite to invoking the jurisdiction of a court to review an agency's action.⁶² The court could not, therefore, apply Trial Rule 6(A)⁶³ which would validate the notice given here. Left with the bare notice statute, the court, following a line of recent cases,⁶⁴ reluctantly held that the thirty day notice requirement was to be strictly construed despite its undeniably harsh result to the taxpayer.

Judge Lybrook, in an incisive concurring opinion, stated that he and his colleagues were constrained to apply the strict interpretation to the time of notice statute only because of an apparent legislative oversight. In a strongly worded statement, addressed more to the Indiana General Assembly than to the litigants in the instant case, he urged a cure of these inequities in a vein similar to that wrought by Trial Rule 6(A) and the comparable federal rule. These rules toll the time periods on a Saturday or Sunday and are thus invested with a desirable modicum of common sense. Observing that the Board had not been harmed in any way by receiving notice the day after the technical tolling of the time period, Judge Lybrook implied that failure to deal with this problem legislatively could, by logical extension of the strict construction interpretation, work bizarre results. The Board could, he noted, avoid the consequences of an appeal by simply closing its doors to business, leaving "the taxpayer's fate to the mercy of the office hours of the State Board of Tax Commissioners."⁶⁵

⁶¹IND. CODE § 6-1-31-4 (Burns 1973).

⁶²*Accord*, *Clary v. National Friction Prods., Inc.*, 290 N.E.2d 53 (Ind. 1972).

⁶³IND. R. TR. P. 6(A) provides that if the last day of a computed period is a Saturday, a Sunday, a legal holiday, or "a day the office in which the act is to be done is closed during regular business hours," then the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or a day on which the office is closed.

⁶⁴*Weatherhead Co. v. State Bd. of Tax Comm'rs*, 281 N.E.2d 547 (Ind. Ct. App. 1972); *Raab v. Indiana Bd. of Tax Comm'rs*, 143 Ind. App. 139, 238 N.E.2d 697 (1968).

⁶⁵307 N.E.2d at 108.

C. Separation of Functions in Local Government

In *State ex rel. Michigan City Plan Commission v. LaPorte Superior Court*,⁶⁶ the Indiana Supreme Court held that an injunction could not issue to prospectively restrain legislative action by the Michigan City Common Council. This issue arose when an amendment to a local zoning ordinance was proposed by the Council. This proposal was referred to the city's Plan Commission for notice and public hearing. Even though the Plan Commission disapproved the proposed zoning change and refused to commend it to the Council, the Council chose to proceed with consideration of the zoning amendment. The Superior Court then enjoined passage of the amendment.

While conceding that trial courts have jurisdiction to entertain suits challenging the validity of an amendment to a zoning ordinance, the supreme court held that no such power exists prior to the actual adoption of the amendment.⁶⁷ To hold otherwise, the court noted, would give rise to the "mischievous consequences that may result from the attempts of courts of equity to control proceedings of municipal bodies."⁶⁸ This decision, firmly rooted in principles of jurisdiction, assures municipal legislative bodies of the power to consider changes without unrestrained judicial interference.

This is not to say, however, that courts are restrained from exercising otherwise proper authority over municipal affairs. In *Noble v. City of Warsaw*,⁶⁹ the court of appeals declared an annexation statute constitutional. Following the annexation of territory to a city, an appeal may be taken if the affected landowners, within sixty days, file a remonstrance thereto in the circuit or superior court of the appropriate county. The statutory provision at issue states that the circuit or superior court "may order the proposed

⁶⁶297 N.E.2d 814 (Ind. 1973). This was an original action brought by the Michigan City Common Council against the LaPorte Superior Court. The petitioners sought a writ of prohibition to prevent the respondent court from exercising further jurisdiction in a suit for injunctive relief brought by the opponents of a proposed zoning ordinance.

⁶⁷*Id.* at 815-16. See also *State ex rel. Development Co. v. Circuit Court*, 240 Ind. 648, 167 N.E.2d 470 (1960); *State ex rel. City of South Bend v. St. Joseph Superior Court*, 238 Ind. 88, 148 N.E.2d 558 (1958).

⁶⁸297 N.E.2d at 816, quoting from *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 482 (1895). In *New Orleans Water Works*, suit was brought by the water company seeking a decree restraining the lessee of a hotel, acting under the authority of a city ordinance, from laying pipes for the purpose of conveying water from the Mississippi River to his hotel. The Court held that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character.

⁶⁹297 N.E.2d 916 (Ind. Ct. App. 1973).

annexation . . . notwithstanding the provisions of any other law.”⁷⁰ The appellants contended that the statute unconstitutionally vested legislative power in the courts by permitting discretionary control over municipal action. The court rejected appellant’s argument and held that the statute did not vest legislative power in the courts but, rather, authorized the courts to determine whether the city had complied with all the statutory requirements for annexation.

Although the statute provides that courts “may” order annexation, it was given a mandatory construction. The court of appeals reasoned that, although “may” normally implies discretion, it will be construed to mean “shall” when its ordinary meaning would defeat the objective of the statute and the intent of the legislature. Thus, if the court finds compliance with the annexation statute, it must order the annexation.⁷¹

III. Business Associations

*Paul J. Galanti**

The following survey of developments in the corporate area during the past year should be considered an overview rather than an extensive analysis.¹

A. Securities Fraud

A somewhat unusual securities fraud case was before the First District Court of Appeals in *Soft Water Utilities, Inc. v. LeFevre*.² The court affirmed a judgment for plaintiff entered by the Putnam County Circuit Court. The suit arose out of LeFevre’s April 8, 1959, purchase of 2,080 shares of what he believed was a new issue of 50,000 common shares of Soft Water Utilities [SWU]. In fact,

⁷⁰IND. CODE § 18-5-10-25 (IND. ANN. STAT. § 48-722, Burns Supp. 1974) (emphasis added).

⁷¹297 N.E.2d at 919.

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The author wishes to express his appreciation to Thomas J. Blee for his assistance in preparing this survey of corporate developments.

¹A case worth noting in passing is *Lindenberg v. M & L Builders & Brokers, Inc.*, 302 N.E.2d 816 (Ind. Ct. App. 1973), in which the court restated the well established principle that changing the name of a corporation does not affect its liability for indebtedness previously incurred. See, e.g., *Rice v. Fletcher Savings & Trust Co.*, 215 Ind. 698, 22 N.E.2d 809 (1939).

²308 N.E.2d 395 (Ind. Ct. App. 1974) (Robertson, J.).

they were previously issued shares that had been purchased by defendant Farrell, a licensed stockbroker employed by SWU as a selling agent for the new issue. The actual sale was made by Farrell's employee, Hurst. A prospectus covering the issue had been prepared and registered with the Indiana Securities Commissioner under the Indiana Securities Law in effect in 1959.³ The prospectus contained a balance sheet showing the net worth of the corporation as \$343,690.85. This figure would have been increased by approximately \$250,000 if the entire issue had been sold at the asking price of \$5 a share.

An intriguing aspect of the case is that it was not based on the civil remedy provided in the then effective Securities Law. That remedy was rescission of the transaction by the purchaser.⁴ Rather, LeFevre's suit was for damages for common law fraud. The decision does not explain his rationale, but presumably he was motivated by the two year statute of limitations applicable to rescission actions.⁵ The appellate court held that rescission was not the exclusive remedy available to purchasers since the statute specifically provided that "the rights and remedies provided by this act shall be in addition to any and all other rights and remedies that may exist at law or in equity."⁶

Thus, the key to the *LeFevre* case was whether plaintiff had established the four essential elements of common law fraud: material misrepresentations, scienter, reliance by plaintiff, and injury.⁷ Central to the misrepresentation element was the evidence that Farrell had "made a market" in SWU stock by trading approximately

³Ch. 120, §§ 1-25, [1937] Ind. Acts 656 (repealed 1961); ch. 30, §§ 1-12, [1941] Ind. Acts 71 (repealed 1961); ch. 35, §§ 1-4, [1947] Ind. Acts 98 (repealed 1961); ch. 239, § 1, [1949] Ind. Acts 791 (repealed 1961); ch. 194, §§ 1-3, [1951] Ind. Acts 526 (repealed 1961); ch. 127, § 1, [1953] Ind. Acts 438 (repealed 1961); ch. 290, § 1, [1955] Ind. Acts 829 (repealed 1961); ch. 224, § 1, [1959] Ind. Acts 536 (repealed 1961).

⁴Ch. 120, § 19, [1937] Ind. Acts 656 (repealed 1961). This provision contrasts with the civil penalty section of the current Securities Law, IND. CODE § 23-2-1-19(a)(1)-(2) (Burns 1972), which provides for rescission or damages in the event the purchaser no longer owns the security sold in violation of the Act.

⁵Ch. 120, § 19, [1937] Ind. Acts 656 (repealed 1961).

⁶Ch. 120, § 22, [1937] Ind. Acts 656 (repealed 1960). The saving clause in the current statute, adopted in 1961, provides that a right of action conferred by the prior law is not impaired or abrogated by its repeal. IND. CODE § 23-2-1-23 (Burns 1972).

⁷*Edwards v. Hudson*, 214 Ind. 120, 122, 14 N.E.2d 705, 706 (1938); *Middlekamp v. Hanewich*, 147 Ind. App. 561, 566, 263 N.E.2d 189, 192 (1970); *Farm Bureau Mut. Ins. Co. v. Seal*, 134 Ind. App. 269, 277, 179 N.E.2d 760, 763 (1962). For a general discussion of common law fraud, see W. PROSSER, *LAW OF TORTS* §§ 105-10 (4th ed. 1971) [hereinafter cited as PROSSER]; *RESTATEMENT OF TORTS* §§ 525-49 (1938).

17,000 previously issued shares. He apparently followed the "classic" investment advice of buying low at \$2 to \$4 a share, and selling high at \$5 per share as specified in the prospectus for the new issue. Hurst's specific misrepresentations were flagrant and apparent. LeFevre was told that the new issue of 50,000 shares was almost sold out, whereas in fact only 1,089 shares were ever sold. LeFevre was led to believe he was buying the new issue whereas in fact he was buying stock owned by Farrell. Hurst told LeFevre that the funds obtained through the sale would go to the corporate treasury, but the \$10,400 paid for the stock apparently went to Farrell rather than to the corporation. If most of the new issue had been sold and the proceeds received by SWU, its net worth would have been augmented by approximately \$250,000 less the broker's fee owed Farrell, which was far more than the approximately \$5,500 actually received. The court concluded that the fact that the "misrepresentations were material cannot be seriously contested."⁸

SWU contended that no false representations were made because the transaction had shifted from the new to the prior stock when LeFevre disclosed that he did not have the necessary cash, as required by the prospectus, to buy the new stock. LeFevre instead offered Hurst 1,000 shares of another company in exchange for the SWU stock. Farrell eventually approved the deal and credited LeFevre with \$10,000. SWU argued that LeFevre, as an experienced investor, must have known that the subject matter of the transaction had changed; ergo, no false representations had been made. LeFevre responded that it was his understanding that Farrell would either sell the stock on the open market or buy it himself and use the proceeds to purchase the new issue SWU shares. The trial court accepted LeFevre's understanding of the transaction and the appellate court concluded the finding was adequately supported by the record.

The court next considered the scienter, or guilty knowledge, element of the fraud action. The court acknowledged that Hurst might not have been aware of the falsity of his representations, but considered this irrelevant since Hurst received his information and instructions from Farrell and since the evidence was such that scienter readily could be inferred to Farrell.⁹ The court categorically

⁸308 N.E.2d at 397.

⁹The evidence indicated that, as SWU's exclusive agent for selling the new issue, Farrell had convinced the board of directors that it was necessary for him to trade in the previously issued stock. Since he bought and sold approximately 17,000 old shares, while selling only 1,089 new shares, the trial court was correct in concluding that previously issued stock was being sold as new and that Farrell was aware of the false representations being made by Hurst in furthering the fraudulent scheme. *Id.* at 398.

rejected SWU's suggestion that scienter and the other elements of the fraud cause of action cannot be established by inference. The law in this respect is well settled. Positive evidence of fraud is not required and it is sufficient if a plaintiff proves facts and circumstances from which fraud fairly can be inferred.¹⁰

The deception and reliance element was satisfied by LeFevre's showing that he reasonably relied on the SWU prospectus which referred only to the new issue stock; further, his questions concerning SWU's use of the proceeds showed sufficient care and diligence in guarding against fraud since the answers did not put him on notice to investigate further. As the court stated, "a person has a right to rely upon representations where the exercise of reasonable prudence does not dictate otherwise."¹¹ This is particularly true when the statements are not obviously false on their face or when, as here, the facts are peculiarly within the knowledge of the seller.¹² The injury element was satisfied by the trial court's finding that LeFevre had paid \$10,400 for an interest in a corporation which had a net worth substantially less than the value represented. Since SWU had not received the proceeds from LeFevre's purchase nor from any of the other supposed sales of the new issue stock, its prospects for future growth and increased profits were considerably diminished.

All of this only established that Farrell had committed fraud. To recover against SWU, LeFevre had to establish an agency or conspiracy relationship between Farrell and the corporation. The court of appeals concluded that an agency relationship had been established. Farrell had been employed by SWU for the purpose of selling the new issue of stock. This at least clothed Farrell, and his employee Hurst, with the apparent authority to make representations on behalf of the principal, SWU. Basic to the concept of apparent authority is the principal's *manifestation* to the third party that the agent is authorized to negotiate or make representations on the principal's behalf.¹³ This "holding out" element was

¹⁰See *Grissom v. Moran*, 290 N.E.2d 119, 123 (Ind. Ct. App. 1972); *Edwards v. Hudson*, 214 Ind. 120, 122, 14 N.E.2d 705, 706 (1938); *Middlekamp v. Hanewich*, 147 Ind. App. 561, 566, 263 N.E.2d 189, 192 (1970).

¹¹308 N.E.2d at 398. See *Grissom v. Moran*, 290 N.E.2d 119, 124 (Ind. Ct. App. 1972); *Voorhees v. Cragun*, 61 Ind. App. 690, 700, 112 N.E. 826, 829 (1916).

¹²See *Grissom v. Moran*, 290 N.E.2d 119, 124 n.10 (Ind. Ct. App. 1972); *Kluge v. Ries*, 66 Ind. App. 610, 117 N.E. 262 (1917). See generally PROSSER § 108, at 715-18; cf. RESTATEMENT (SECOND) OF AGENCY § 171 (1958).

¹³See *Gizzi v. Texaco, Inc.*, 437 F.2d 308 (3d Cir. 1971); *Storm v. Marsischke*, 304 N.E.2d 840, 842 (Ind. Ct. App. 1973) (discussed at text accompanying notes 103-13 *infra*); *Farm Bureau Mut. Ins. Co. v. Coffin*, 136 Ind. App. 12, 17-18, 186 N.E.2d 180, 183 (1962). See generally RESTATEMENT (SECOND) OF

satisfied in *LeFevre* by the statement in the prospectus that Farrell had the exclusive contract to sell the new issue.¹⁴

Although not all authorities agree,¹⁵ the *LeFevre* court adopted the position of the *Restatement (Second) of Agency* that an entirely innocent principal who puts an agent in a position to commit fraud while apparently acting within his authority is liable for the fraud.¹⁶ The comments to the relevant section of the *Restatement* emphasize that it was the principal who placed the agent in the position to consummate the fraud and that, from the point of view of the third person, the transaction would seem regular on its face. It is irrelevant that the principal is innocent and might not have received the benefits of the fraud. Of course, there is no question of liability if the principal is involved in the fraud.¹⁷ Since the *LeFevre* court found apparent authority, it did not consider whether Farrell or Hurst had actual authority to make the representations in question.

At this point, the appellate court differed with the trial court's conclusion that Farrell and SWU had conspired to defraud *LeFevre*. There is authority that, under extraordinary circumstances, a corporation can conspire with its officers or independent agents,¹⁸ but the general rule is that a corporation and its agents acting within the scope of their authority are one entity and hence cannot conspire.¹⁹ The court concluded that the *LeFevre* case was within the

AGENCY §§ 8, 27 (1958); W. SEAVEY, LAW OF AGENCY § 8D (1964) [hereinafter cited as SEAVEY].

¹⁴308 N.E.2d at 399.

¹⁵See, e.g., *Mills v. Lewis Wood Preserving Co.*, 93 Ga. App. 398, 91 S.E.2d 785 (1956); *Mesce v. Automobile Ass'n*, 8 N.J. Super. 130, 135-36, 73 A.2d 586, 588-89 (App. Div. 1950).

¹⁶RESTATEMENT (SECOND) OF AGENCY § 261, comment *a* at 570-71 (1958). See *Bowman v. Home Life Ins. Co.*, 243 F.2d 331 (3d Cir. 1957); *Old Line Auto. Insurers Co. v. Kuehl*, 127 Ind. App. 445, 451-52, 141 N.E.2d 858, 861 (1957). See generally RESTATEMENT (SECOND) OF AGENCY §§ 257-58, 264-65 (1958); SEAVEY §§ 60, 61, 92.

¹⁷*Dellefield v. Blockdel Realty Co.*, 128 F.2d 85, 91 (2d Cir. 1942); *Ashby v. Peters*, 128 Neb. 338, 258 N.W. 639 (1935). See generally RESTATEMENT (SECOND) OF AGENCY § 257 (1958); SEAVEY § 92C.

¹⁸See, e.g., *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 469-70 (1962); *Tamaron Distrib. Corp. v. Weiner*, 418 F.2d 137 (7th Cir. 1969).

¹⁹The court cited *Johnston v. Baker*, 445 F.2d 424 (3d Cir. 1971); *Pearson v. Youngstown Sheet & Tube Co.*, 332 F.2d 439 (7th Cir. 1964); and the leading case on point, *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). The *Nelson* court drolly commented that the president, sales manager and other officers and employees of Motorola were "certainly a unique group of conspirators." 200 F.2d at 914. See also *Goldlawr v. Shubert*, 276 F.2d 614 (3d Cir. 1960); *Johnny Maddox Motor Co. v. Ford Motor Co.*, 202 F. Supp. 103 (W.D. Tex. 1960).

general rule rather than the exception. One of the cases cited by the court was *Johnston v. Baker*,²⁰ wherein the Court of Appeals for the Third Circuit, recognizing that normally a corporation cannot conspire with its agents, nonetheless concluded that the fact of agency alone will not preclude a finding of conspiracy when there is evidence that the conspirators were acting for their personal interests and at least one of the parties to the conspiracy was not an employee or agent "as such" of the corporation. Perhaps Hurst, who was at best a sub-agent of SWU, fell into that category and even Farrell might have been sufficiently independent as a broker to satisfy the requirement. Certainly Farrell was not acting solely in SWU's interests. The *Johnston* court declined to rule whether the personal interests of a conspirator alone would sustain a conspiracy charge without a non-employee or non-agent defendant but intimated that it might so rule in an appropriate case.²¹ Although it is possible that the *LeFevre* court erred on the conspiracy issue, agreement with the trial court would only have been an additional ground for affirming a judgment which would stand, in any event, on the agency showing.²²

B. Indiana Securities Law Exemptions

The consequences of not complying with the registration requirements of the Indiana Securities Law²³ were amply demonstrated in *Hippensteel v. Karol*,²⁴ in which the Third District Court of Appeals reversed the Allen County Superior Court and instructed it to enter judgment for plaintiff Hippensteel. *Hippensteel* was a case of first impression in Indiana and presents some interesting problems for private individuals, as opposed to brokers or issuers, who sell securities. The case arose when defendant Karol, a doctor, sold securities of Ingenio La Gartia, a Costa Rican sugar refinery, to nine of his professional associates and colleagues. The securities were not registered with the Indiana Securities Commissioner.²⁵

²⁰445 F.2d 424 (3d Cir. 1971). The judgment for plaintiff was affirmed in this action against the owner and the president of a hotel corporation alleging a conspiracy to injure plaintiff's business.

²¹*Id.* at 427.

²²The court also rejected SWU's contention that it was error for the trial court to award prejudgment interest. The court concluded that LeFevre's damages, determined to be \$6,644, were ascertainable at the time of the sale and that interest in such a case is appropriate. *New York, C. & St. L. Ry. v. Roper*, 176 Ind. 497, 503-04, 96 N.E. 468, 472 (1911).

²³IND. CODE §§ 23-2-1-1 to -25 (Burns 1972).

²⁴304 N.E.2d 796 (Ind. Ct. App. 1973) (Staton, J.).

²⁵The registration provision of the Indiana Securities Law, IND. CODE § 23-2-1-3 (Burns 1972), is as follows:

It is unlawful for any person to offer or sell any security in this

They were sold in units of one share of stock and a debenture at \$6,000 a unit. The transaction with Hippensteel was the last of the nine.

Karol's involvement with Ingenio La Gartia began when he purchased twenty units for \$120,000. After attending a shareholders meeting in January, 1967, he decided to sell eighteen of the twenty units at his original cost of \$108,000. The opinion does not indicate if Karol became soured on the investment at the meeting. Subsequent to the sales, he came under pressure from the management and other shareholders of the Costa Rican company to reinvest. He did reinvest in May, 1967, when he purchased eight additional units of the unregistered securities. Either he still had some doubts about the company or he actually was in the securities business because, in July, 1967, he sold five units to Hippensteel for an agreed price of \$30,000. When it became apparent to Hippensteel, within the two year statute of limitations,²⁶ that the company might be in financial difficulty, he filed his complaint alleging that (1) the sale of the securities was fraudulent at common law and violated the fraudulent practices provision of the Securities Law,²⁷

state unless (1) it is registered under this act or (2) the security or transaction is exempted under section 102 [*Id.* § 23-2-1-2].

The statute provides two methods of registering securities. *Id.* § 23-2-1-4 sets forth the procedures for registration by coordination when a registration statement has been filed with the Securities and Exchange Commission in connection with the same offering under the Federal Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1970). The more complex registration by qualification procedures, which apply when no registration statement will be filed with the SEC, are set forth in IND. CODE § 23-2-1-5 (Burns 1972). For a brief, but comprehensive, comparison of the treatment of nonissuer transactions under the Securities Act of 1933 and the state securities acts, commonly known as "Blue Sky Laws," see Note, *Regulation of Nonissuer Transactions Under Federal and State Securities Registration Laws*, 78 HARV. L. REV. 1635 (1965). For a general discussion of Blue Sky Laws, see 14 W. FLETCHER, PRIVATE CORPORATIONS §§ 6738-44 (perm. repl. ed. 1965) [hereinafter cited as FLETCHER]; H. HENN, LAW OF CORPORATIONS §§ 306-08 (1970) [hereinafter cited as HENN]; N. LATTIN, CORPORATIONS § 44 (2d ed. 1971) [hereinafter cited as LATTIN]. State securities legislation is extensively and critically treated in L. LOSS & E. COWETT, BLUE SKY LAWS (1958). For a general discussion of registration requirements under the Indiana statute, see Note, *Securities Registration Requirements in Indiana*, 3 IND. LEGAL F. 270 (1969).

²⁶IND. CODE § 23-2-1-19(e) (Burns 1972).

²⁷*Id.* § 23-2-1-12 provides:

It is unlawful for any person in connection with the offer, sale or purchase of any security, either directly or indirectly, (1) to employ any device, scheme or artifice to defraud, or (2) to make any untrue statements of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of circumstances under which they are made, not misleading, or (3) to

and (2) the sale violated the registration requirements of the Securities Law and thus was voidable under the civil penalty section.²⁸

After a two day trial, the court found that Hippensteel had failed to prove his statutory and common law fraud allegations and that the sale was exempt from the registration requirements of the statute. Only the exemption issue was before the appellate court since the negative judgment on the fraud question presented no issue for review.²⁹ On the exemption issue, the court of appeals held that the trial court erred in concluding that Karol had successfully met his burden of establishing that the transaction was exempt.³⁰ Karol claimed the transaction was exempt on two statutory grounds. The first one discussed was Indiana Code section 23-2-1-2(b) (10), which exempts the offer or sale of unregistered securities if, during a period of twelve consecutive months, the offeror has not directed offers to sell securities of the same class to more than twenty persons.³¹

Karol unquestionably had offered the securities to less than twenty persons, but he ran afoul of the additional requirement that either each buyer must represent in writing to the seller that the securities are purchased for investment purposes or the seller must obtain a ruling of the Securities Commissioner waiving the conditions.³² The purchasers no doubt bought the securities for invest-

engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

This provision closely parallels rule 10b-5, 17 C.F.R. 240.10b-5 (1973), promulgated by the SEC under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970). Like the Indiana Securities Law in effect in 1959 which was involved in *Soft Water Utilities, Inc. v. LeFevre*, 308 N.E.2d 395 (Ind. Ct. App. 1974), discussed at text accompanying notes 2-22 *supra*, the rights and remedies available under the current act are not exclusive. IND. CODE § 23-2-1-19(h) (Burns 1972).

²⁸IND. CODE § 23-2-1-19 (Burns 1972). This section provides that one who offers or sells a security by means of misrepresentations, either active or passive, is liable to the purchaser for the amount paid or for damages in the event the purchaser no longer owns the security. The civil penalty is in addition to the criminal penalties authorized by *id.* § 23-2-1-18.

²⁹See *Schuh v. State*, 251 Ind. 403, 406, 241 N.E.2d 362, 364 (1968); *Engelbrecht v. Property Developers, Inc.*, 296 N.E.2d 798, 801 (Ind. Ct. App. 1973).

³⁰IND. CODE § 23-2-1-16(j) (Burns 1972) provides that the burden of proof of an exemption or a classification from the application of the act "shall be upon the party claiming the benefits of such exemption or classification." For a general discussion of exemptions under the Indiana act, see Note, *Securities Registration Requirements in Indiana*, 3 IND. LEGAL F. 270, 285-94 (1969).

³¹IND. CODE § 23-2-1-2(b) (10) (Burns 1972). Excluded from this calculation are persons receiving offers which would otherwise be exempt.

³²*Id.* This provision is based on UNIFORM SECURITIES ACT § 402(b) (9).

ment, albeit speculative investment. However, Karol could produce neither the so-called investment letters³³ nor a ruling of the Commissioner. Thus the appellate court was constrained to hold that he had failed to carry his burden establishing the exemption. While Karol no doubt argued that section 23-2-1-2(b)(10) laid a statutory trap for the non-professional seller of unregistered securities, the court had no choice except to follow the explicit language of the statute and deny the exemption on this ground.³⁴

The second possible exemption³⁵ discussed by the court was provided by Indiana Code section 23-2-1-2(b)(1), which exempts "any isolated nonissuer transaction, whether effected through a broker-dealer or not."³⁶ Thus the court was required to decide whether the sale of the eighteen units for \$108,000 during early 1967 and the somewhat later sale to Hippensteel of five units for \$30,000 could be considered "isolated transactions." The court said no. In so holding, it was the first Indiana court to construe the meaning of the word "isolated." This was a difficult task since "definitional indefiniteness is . . . traditionally and probably inevitable"³⁷ in this area of the law and is only eased somewhat by the fact that the language was taken verbatim from the Uniform Securities Act.³⁸

The appellate court noted that although isolated transaction exemptions are nearly universal, the form varies and the authorities on point are limited. In fact, only three of the twenty-seven jurisdictions that have adopted the Uniform Securities Act have

³³Investment letters are, or perhaps more accurately were, quite significant in the "private placement exemption" under section 4(1) of the Securities Act of 1933, 15 U.S.C. § 77d(1) (1970). The past tense reference is prompted by rule 144, 17 C.F.R. § 230.144 (1973), recently promulgated by the SEC, which rule substantially tightens the requirements for disposing of unregistered securities. See generally Miller & Seltzer, *The S.E.C.'s New Rule 144*, 27 BUS. LAW. 1047 (1972); Wheat, Phillips, Wander & Garrett, *Developments in Private Placements, Distribution of Restricted Securities; Rule 144*, 28 BUS. LAW. 483 (1973).

³⁴304 N.E.2d at 802. See generally Note, *Securities Registration Requirements in Indiana*, 3 IND. LEGAL F. 270, 291-92 (1969).

³⁵The court recognized that the decision had to be affirmed if there were an alternative basis supporting the trial court's conclusions. See *Indiana & Mich. Elec. Co. v. Schnuck*, 298 N.E.2d 436, 438 (Ind. 1973); 3 F. WILTROUT, *INDIANA PRACTICE* § 2790(1) (1967).

³⁶IND. CODE § 23-2-1-2(b)(1) (Burns 1972).

³⁷304 N.E.2d at 800. The court cited L. LOSS & E. COWETT, *BLUE SKY LAWS* 317-19 (1958), and the Official Comments to sections 305(i) and (j) of UNIFORM SECURITIES ACT § 305, although the latter reference is somewhat obscure.

³⁸UNIFORM SECURITIES ACT § 402(b)(1) (as amended August, 1958). See generally Note, *Securities Registration Requirements in Indiana*, 3 IND. LEGAL F. 270, 286-87 (1969).

case law interpreting the exemption.³⁹ The court relied primarily on *Nelson v. State*,⁴⁰ in which the Oklahoma Court of Criminal Appeals affirmed the conviction of Nelson for selling unregistered stock. In so doing, the court defined the term "isolated sale" to mean "one standing alone, disconnected from any other . . . [and] of a nonrecurring nature engaged in by persons not engaged in the securities business. . . ."⁴¹ A similar approach was adopted by the Kentucky Court of Appeals in *Commonwealth v. Allen*,⁴² in which case the defendant had contacted thirty persons but had sold unregistered securities to only ten. The *Allen* court held that evidence of all the sales or offers determines whether the sale in question was an isolated transaction. The *Hippensteel* court likewise examined all of Karol's transactions in rejecting his exemption argument.

The appellate court also cited *Allen v. Schauf*,⁴³ in which the Kansas Supreme Court held that a challenged transaction was exempt. The *Schauf* case is instructive because the result turned not on an analysis of the particular transaction but on the application of an administrative regulation defining isolated transactions as those in which the number of persons solicited during any twelve month period is less than four.⁴⁴ The Indiana court showed a clear preference for this "definitive regulations" approach. The court not only expressed regret that it had no choice but to adopt the approach of the Oklahoma court in *Nelson*,⁴⁵ but also very pointedly noted that two states, Mississippi and Tennessee, had promulgated administrative regulations defining the limits of their statutes' exemptions.⁴⁶

³⁹*Allen v. Schauf*, 202 Kan. 348, 449 P.2d 1010 (1969); *Commonwealth v. Allen*, 441 S.W.2d 424 (Ky. Ct. App. 1969); *Sisson v. State*, 404 P.2d 55, (Okla. Crim. App. 1964); *Nelson v. State*, 355 P.2d 413 (Okla. Crim. App. 1960). See 69 AM. JUR. 2d *Securities Regulation—State* § 79, at 1113 (1973).

⁴⁰355 P.2d 413 (Okla. Crim. App. 1960). The *Nelson* case was followed in *Sisson v. State*, 404 P.2d 55 (Okla. Crim. App. 1964), in which the court held that the sale of securities of an insurance company to more than ten persons did not qualify under the exemption.

⁴¹355 P.2d at 420. Further, the court stated that the word isolated is not a word of art, but "is a term the application of which must depend on the facts of each case." *Id.*

⁴²441 S.W.2d 424 (Ky. Ct. App. 1969).

⁴³202 Kan. 348, 449 P.2d 1010 (1969).

⁴⁴2 KAN. AD. RULES & REG. § 81-1-1.

⁴⁵304 N.E.2d at 801.

⁴⁶*Id.* at 801 n.3. Section 75-71-53.3 of the Mississippi Blue Sky Law, MISS. CODE ANN. §§ 75-71-1 to -57 (1972), exempts isolated transactions, which are defined by Mississippi Regulation § 138(c) as not more than two transactions of similar character within any consecutive six month period. The Tennessee statute, TENN. CODE ANN. § 48-1632(D) (1964), also exempts

The court seemed to favor the isolated transaction approach taken by non-uniform act jurisdictions which do not have administrative regulations.⁴⁷ It is doubtful that the court would have ruled for Karol even if it had been free to rely on the interpretations given to other statutes. Perhaps it simply felt that the rule of cases such as *Kneeland v. Emerton*⁴⁸ was clearer and easier to apply. In *Kneeland*, the Massachusetts Supreme Court dealt at length with the isolated transaction problem and opined that an exempt sale was "[a]ny isolated sale of any security by the owner thereof . . . such sale not being made in the course of repeated or successive transactions of a like character"⁴⁹ In rejecting defendant's challenge to the constitutionality of the provision, the *Kneeland* court pointed out that the reference to "repeated and successive transactions of a like character" was intended to contrast with the term "isolated sales" and stated that, in fact, as few as two successive sales of securities can remove the second sale from the exempt category if it is determined that the seller intended to make repeated and successive sales of the unregistered security.⁵⁰ This poses an intriguing possibility in the context of *Hippensteel*. Could the *first* sale be considered as part of a "repeated and successive" transaction and, if so, could the first purchaser rescind his purchase if not barred by the statute of limitations?

To make clear its point on the regulatory approach to the isolated sales exemption, the *Hippensteel* court opined that, "without an administrative regulation, only strict compliance with the statutory requirements will effect an exemption."⁵¹ Since the last of nine separate sales within a six month period of twenty-three units of securities for \$138,000 could be deemed an "isolated transaction" only by a quantum stretch of the imagination, Karol failed to establish an exemption under section 23-2-1-2(b) (1). Thus *Hippensteel* was clearly entitled to rescind the transaction under the Securities Law. The result in *Hippensteel* is not shocking but its stringent application in other situations might give a sharp investor a perfect speculative investment, that is, one with high potential gain and no

such transactions. This exemption has been limited by the Tennessee Division of Securities to no more than ten repeated and successive transactions. See generally Miller, *Procedures Under the Tennessee Securities Law*, 28 TENN. L. REV. 303, 308 (1961).

⁴⁷304 N.E.2d at 801 n.4.

⁴⁸280 Mass. 371, 183 N.E. 155 (1932).

⁴⁹*Id.* at 381, 183 N.E. at 160. Since the sale was by a registered broker, the court simply ruled that he could not benefit from an exemption designed for the owners of unregistered securities.

⁵⁰*Id.* at 388-89, 183 N.E. at 163.

⁵¹304 N.E.2d at 802.

downside risk so long as suit is filed before the statute of limitations runs.

C. *Fiduciary Obligations and Dividend Policies*

The obligations of a majority shareholder of a closely held corporation and the situation in which a court of equity will order the payment of a corporate dividend were the issues resolved by the Third District Court of Appeals in *Cole Real Estate Corp. v. Peoples Bank & Trust Co.*⁵² Plaintiff bank, as trustee, owned 86 of the 4,120 common shares of Cole Real Estate Corporation and brought this suit against the corporation and Helen F. Cole, who was the owner of the balance of the stock and the corporation's president, treasurer and sole employee. The trustee sought an accounting for and recovery of corporate assets and an order declaring a dividend. The trial court held that Cole had converted corporate assets to her own use and benefit and that the corporation had sufficient assets to permit a dividend of \$1 per share for each of the years from 1964 to 1970. The sole issue on appeal was the sufficiency of the evidence supporting the findings of the trial court. The appellate court concluded that the evidence was sufficient and affirmed the judgment after modifying it by reducing the amount of the award.⁵³

Although the corporation was formed in 1935, there was little evidence that a corporate identity had been maintained. Cole had not filed annual reports for several years and the most recent board of directors meeting was held in 1954 when the corporation was reorganized. Cole testified that she could not recall when the present board took office. She knew the General Corporation Act required annual meetings of shareholders,⁵⁴ but none had been held because of a lack of interest. Cole had the use of two company-owned cars and lived rent free in a home owned by the corporation which served as the corporate office from which she managed the business. She further testified that she had set her own salary from 1964 to 1970, ranging from \$4,593.16 in 1964 to a high of \$10,998.20 in 1967, without consulting the board of directors.

⁵²310 N.E.2d 275 (Ind. Ct. App. 1974) (Staton, J.).

⁵³*Id.* at 282. The trial court awarded attorneys' fees to the Peoples Bank. The amount of these fees was also reduced on appeal. The court noted that the defendants had made only a weak attack on this award and concluded that the award was justified in an equitable proceeding by a minority shareholder to compel those in control to restore money wrongfully converted. *Id.* at 280 n.3. See *Princeton Coal & Mining Co. v. Gilchrist*, 51 Ind. App. 216, 224, 99 N.E. 426, 428-29 (1912); *Atwater v. Elkhorn Valley Coal Land Co.*, 184 App. Div. 253, 171 N.Y.S. 552, *aff'd*, 227 N.Y. 611, 125 N.E. 912 (1918).

⁵⁴IND. CODE § 23-1-2-9 (b) (Burns 1972).

Defendants first attacked the judgment on the "assumption," in the words of the court, that the minority shareholder could not maintain the derivative action because of failure to exhaust intra-corporate remedies before filing suit.⁵⁵ Although this is a well settled principle of corporate law,⁵⁶ it is equally well settled that a demand for corporate action is unnecessary prior to filing suit on behalf of a corporation when the directors have acted in their own interests or the majority shareholder has acted illegally or oppressively in the corporate name.⁵⁷ The court cited *First Merchants National Bank & Trust Co. v. Murdock Realty Co.*⁵⁸ as authority. *Murdock* involved corporate officers who had mortgaged company-

⁵⁵310 N.E.2d at 278. Perhaps "assumption" was the right word since the actual theory of the case is not absolutely clear. Although a shareholder derivative action, rather than a direct action, is the normal method of recovering corporate assets from insiders who have abused their trust, the court here refers to the suit as an individual action. The rationale in support of derivative actions is clear. The corporation itself, rather than the individual shareholder, has been injured by the acts of the defendants and the cause of action normally lies with the corporation. Thus, any right of action by a shareholder is "derived" from the action accruing to the corporation. See *Gordon v. Elliman*, 306 N.Y. 456, 119 N.E.2d 331 (1954). This is true even in those derivative actions in which recovery goes to the shareholders rather than to the corporation. See, e.g., *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir.), cert. denied, 349 U.S. 952 (1955). For a general discussion comparing derivative actions with direct actions, see 5 FLETCHER § 2171; HENN §§ 358, 360; LATTIN § 102.

⁵⁶*Tevis v. Hammersmith*, 31 Ind. App. 281, 66 N.E. 79 (1903). Derivative actions are controlled by the provisions of the Indiana Rules of Trial Procedure which provide, in pertinent part, that the shareholder must "allege with particularity the efforts, if any, made by the plaintiff, to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort. . . ." IND. R. Tr. P. 23.1. The requirement that a plaintiff shareholder exhaust intra-corporate remedies before suit is designed to afford the corporation an opportunity to conduct its own litigation since it is the principal party in interest. See, e.g., *Kowalski v. Nebraska-Iowa Packing Co.*, 160 Neb. 609, 71 N.W.2d 147 (1955). See generally 3 FLETCHER § 1284; 13 *id.* §§ 5963, 6008; 2 W. HARVEY, INDIANA PRACTICE 365-75 (1970); HENN §§ 364-67; LATTIN § 105.

⁵⁷See *First Merchants Nat'l Bank & Trust Co. v. Murdock Realty Co.*, 111 Ind. App. 226, 39 N.E.2d 507 (1942). See also *Somberg v. Bluemschine*, 8 F.R.D. 198 (S.D.N.Y. 1948); *Campbell v. Loew's, Inc.*, 36 Del. Ch. 563, 134 A.2d 852 (1957); *Reed v. Norman*, 48 Cal. 2d 338, 309 P.2d 809 (1957). If the board of directors declines to enforce the corporation's right in the exercise of sound business judgment, unaffected by personal interest, the shareholder will be barred from bringing the action. See, e.g., *Swanson v. Traer*, 249 F.2d 854, 858-59 (7th Cir. 1957). See generally 2 FLETCHER § 535; 3 *id.* § 1283; 2 W. HARVEY, INDIANA PRACTICE 365 (1970); HENN § 365; LATTIN § 105.

⁵⁸111 Ind. App. 226, 39 N.E.2d 507 (1942).

owned property to secure individual debts. When suit was brought to foreclose the mortgage, a minority shareholder was permitted to intervene on behalf of the corporation. The court reasoned that corporate officers, whose conduct was being questioned, could not be expected to adequately defend an action involving dissipation of corporate assets. Since it would have been "an idle gesture"⁵⁹ for the shareholder to demand that the corporate officials defend the action, the court placed the suit among those actions in which shareholders can act directly.⁶⁰ While the theory of the *Cole* case might be obscure, there can be little doubt that it would have been futile to require the bank to demand that Cole sue herself.

Defendant Cole then contended, or "assumed," that there was insufficient proof that the compensation she had personally set for herself was so unreasonable as to amount to a conversion of corporate assets. The court recognized that setting the compensation of corporate personnel is primarily the province of the board of directors and that courts should interfere only in exceptional circumstances. It stated that "to be successful, an attack on the amount of compensation paid to a corporate officer-employee must support a finding that the salary in question is unreasonable or unfair."⁶¹ The court cited *Green v. Felton*,⁶² in which minority shareholders alleged that the directors and majority shareholders of a company had fraudulently elected themselves directors and had fixed their salaries at excessive levels. In ruling for the defendants, the *Green* court observed:

But to give the court authority to set aside the action of majority stockholders or board of directors, legally acting under the rules of the company, legally adopted, there must appear injustice or oppression, or circumstances amounting to fraud.⁶³

Finding little comfort in the rule of the *Green* case, the appellate court neatly sidestepped the problem by concluding that Cole was

⁵⁹*Id.* at 237, 39 N.E.2d at 512.

⁶⁰The court relied on *Marcovich v. O'Brien*, 63 Ind. App. 101, 114 N.E. 100 (1916), which delineated those instances when the law recognizes the right of shareholders to institute or defend actions directly, including "where a majority of the stockholders are illegally or oppressively pursuing a course in the name of the corporation, which is in violation of the right of the other stockholders and can only be restrained by a court of equity." *Id.* at 111, 114 N.E. at 103.

⁶¹310 N.E.2d at 279. For a general discussion of corporate compensation, see 3 FLETCHER § 1110; 5 *id.* §§ 2109 *et seq.*; HENN §§ 243-45, 255; LATTIN § 77; 2 H. O'NEAL, CLOSE CORPORATIONS §§ 8.10, 8.12 (1971).

⁶²42 Ind. App. 675, 84 N.E. 166 (1908).

⁶³*Id.* at 685-86, 84 N.E. at 170.

outside the ambit of the *Green* rule, since she ran the corporation "unbridled by even a modicum of corporate formality."⁶⁴

The *Cole* court recognized that, in certain respects, closed corporations may be distinguished from their publicly owned counterparts on matters of corporate formality and internal operation. However, this concession does not countenance the use of corporate assets by insiders for their personal gain.⁶⁵ The court then posited that equity will provide a remedy when a majority shareholder appropriates the corporate earnings for salaries.⁶⁶ But equivocating once again, and not wishing to "act as the regulator of a private corporation . . . in determining what is a fair and reasonable compensation,"⁶⁷ the court put the burden of establishing the unreasonableness of the compensation on the minority shareholder bringing the action. The real problem with the opinion is that the court did not make clear whether this rule applies only when formal corporate action has occurred or when, as in *Cole*, the challenged officer has not followed what can be called the corporate "rules."

In resolving the burden issue, the court relied on two non-Indiana decisions: *Coleman v. Plantation Golf Club, Inc.*⁶⁸ and *Seitz v. Union Brass & Metal Manufacturing Co.*⁶⁹ The *Coleman* case clearly supports the proposition advanced by the *Cole* court. The *Coleman* court held that the minority shareholder bringing the derivative action was required to prove that the salaries were not reasonable or, stated conversely, that they were clearly excessive and wasteful. The *Seitz* case was an action to compel a corporation to declare a dividend and to compel certain officers to repay excessive salaries. The Minnesota court ordered the dividend but refused to compel the officers to repay their salaries because the dissenting shareholder had not proved the requisite wrongdoing or

⁶⁴310 N.E.2d at 279.

⁶⁵*Madding v. Indiana Dep't of State Revenue*, 270 N.E.2d 771 (Ind. Ct. App. 1971); *Tower Recreation, Inc. v. Beard*, 141 Ind. App. 649, 231 N.E.2d 154 (1967); *First Nat'l Bank & Trust Co. v. Murdock Realty Co.*, 111 Ind. App. 226, 39 N.E.2d 507 (1942).

⁶⁶The court cited *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N.E. 487 (1891), in which the supreme court affirmed a judgment for a minority shareholder who charged that corporate officers and majority shareholders were paying themselves exorbitant salaries and using corporate funds to purchase equipment for personal business.

⁶⁷310 N.E.2d at 279. *See generally* 5 FLETCHER § 2122; LATTIN § 77, at 266. Many authorities clearly put the burden on the recipient to prove that the compensation is fair and reasonable when his participation was necessary to approve the compensation or salary. *See Church v. Harnit*, 35 F.2d 499 (6th Cir. 1929), *cert. denied*, 281 U.S. 732 (1930). *Cf. Globe Woolen Co. v. Utica Gas & Elec. Co.*, 224 N.Y. 483, 121 N.E. 378 (1918).

⁶⁸212 So. 2d 806 (Fla. App. 1968).

⁶⁹152 Minn. 460, 189 N.W. 586 (1922). *See Annot.*, 27 A.L.R. 300 (1923).

oppression.⁷⁰ The *Seitz* court emphasized that the salaries had been fixed on a regular basis by the board of directors, which was not true in *Cole*.

After ostensibly putting the burden on the plaintiff, the appellate court undercut its position by concluding that the burden "was met by showing an unauthorized appropriation of corporate assets to Helen Cole's own use in the absence of reasonable justification."⁷¹ The court did not discuss the reasonable value of the use of the home and the automobiles. More importantly, there was no inquiry into the compensation received by officers of similarly situated corporations. Such an inquiry would seem essential, even when a court is reluctant to overturn the findings of the lower court. Rather, the court seemed to take the position that, since Cole had not observed the corporate formalities, *any* compensation she received from her unilateral acts would be unreasonable and excessive. This probably is a correct and desirable result that will force corporate personnel to comply with the less than burdensome corporate formalities required by both the common law and the General Corporation Act. However, the result could have been reached without this judicial "tour de force" if the court had simply stated that a dominant owner of a corporation who ignores such formalities has the burden of justifying his salary or compensation.⁷²

The second issue in *Cole* was whether the trial court erred in ordering a dividend. The appellate court held that the judgment was supported by sufficient evidence. The court recognized that the decision to declare a dividend is within the discretion of the board of directors, subject to certain statutory requirements.⁷³ A court will compel a dividend in appropriate cases but, as the court noted, the burden of proof on a shareholder seeking such relief is necessarily stringent and "only a clear abuse of discretion, established by proof

⁷⁰152 Minn. at 464-65, 189 N.W. at 588.

⁷¹310 N.E.2d at 280.

⁷²See authorities cited note 67 *supra*. See also HENN § 255. After concluding that the trial court was correct on the liability issue, the appellate court found that the trial court erred in computing the judgment based on an assessed conversion of \$75 per month over the seven year period. Thus, it reduced the judgment from \$7,000 to \$6,300 pursuant to IND. R. APP. P. 15(M).

⁷³IND. CODE § 23-1-2-15 (Burns 1972) sets forth the statutory requirements for dividends. The provision gives corporate directors the power, subject to any restrictions contained in the articles of incorporation, to declare and pay dividends on outstanding shares. The section requires that the dividends be paid only out of unreserved and unrestricted earned surplus and precludes the payment of dividends if the corporation is, or thereby becomes, insolvent or if the stated capital of the corporation is, or thereby becomes, impaired. Partial liquidating dividends paid out of capital surplus are permitted by *id.* § 23-1-2-15(f).

of bad faith, oppressive or illegal action, will justify the intervention of a court of equity."⁷⁴

The court cited three Indiana cases to support the general proposition that a court can order dividends: *Star Publishing v. Ball*,⁷⁵ *W.Q. O'Neill Co. v. O'Neill*,⁷⁶ and *Rubens v. Marion-Washington Realty Corp.*⁷⁷ While these cases were initiated by preferred shareholders, the *Cole* court held that such relief was not limited to that class of shareholders. In general, directors may exercise discretion in deciding to pass dividends, even on cumulative preferred stock.⁷⁸ As the *Cole* court rightly observed, the key element in an action to order payment is a showing of an abuse of discretion in passing a dividend. Thus, there is no logical reason why the remedy would be foreclosed to common shareholders. The court cited two New York cases in support of this proposition: *City Bank Farmers Trust Co. v. Hewitt Realty Co.*⁷⁹ and *Gordon v. Elliman*.⁸⁰

In *City Bank*, the court recognized that a petition to compel dividends on common stock could be granted under appropriate circumstances. However, the court refused to compel payment because minority shareholders are barred from interfering with the management of the corporation so long as the directors are acting hon-

⁷⁴310 N.E.2d at 280. For a general discussion of actions to compel the payment of dividends, see 11 FLETCHER § 5325; HENN §§ 328 & 360, at 759-60; LATTIN §§ 144-45; 2 H. O'NEAL, *supra* note 61, § 8.08; Comment, *Proposals to Help the Minority Shareholder Receive Fairer Dividend Treatment from the Closely Held Corporation*, 56 NW. U.L. REV. 503 (1961); Note, *Minority Shareholders' Power to Compel Declaration of Dividends in Close Corporations—A New Approach*, 10 RUTGERS L. REV. 723 (1956).

⁷⁵192 Ind. 158, 134 N.E. 285 (1922). The court ordered dividends on preferred shares since the owner of all the common stock had paid himself five percent common stock dividends while passing the preferred dividends.

⁷⁶108 Ind. App. 116, 25 N.E.2d 656 (1940). The court ordered payment of dividends when the majority shareholder in bad faith refused to declare them. The court, however, refused to affirm that portion of the trial court's ruling mandating the corporation to pay future dividends, stating that the duty to declare dividends "rests in the sound discretion of the directors." *Id.* at 130, 25 N.E.2d at 662. A court may interfere only on a showing of abuse of that discretion. *Id.*

⁷⁷116 Ind. App. 55, 59 N.E.2d 907 (1945), *noted in* 44 MICH. L. REV. 318 (1945). The court held that, when mandatory dividends were subject to certain conditions, the shareholders' remedy was in equity until the dividend was declared.

⁷⁸*Guttmann v. Illinois Central R.R.*, 189 F.2d 927 (2d Cir.), *cert. denied*, 342 U.S. 867 (1951); *Matter of Carlisle*, 53 Misc. 2d 546, 278 N.Y.S.2d 1011 (Sur. Ct. 1967). *See generally* H. BALLENTINE, BALLENTINE ON CORPORATIONS § 231 (rev. ed. 1946); 11 FLETCHER § 5325; HENN §§ 325, 327; LATTIN § 144.

⁷⁹257 N.Y. 62, 177 N.E. 309 (1931).

⁸⁰306 N.Y. 456, 119 N.E.2d 331 (1954).

estly and within their discretionary powers. In other words, the plaintiffs had failed to meet their burden of proving abuse of discretion. The court, in *Gordon*, also concluded that common shareholders can sue to compel dividends on a corporation's common stock.⁶¹ The main holding of *Gordon*, however, was that such equitable actions are derivative rather than direct in nature.⁶²

In disposing of the argument that payment of the dividend would require an invasion of capital, the *Cole* court pointed out that dividends are not necessarily paid out of current taxable income but rather are paid out of the corporation's earned surplus which has built up over the years.⁶³ In the court's opinion, the record showed that Cole Real Estate Corporation had sufficient earned surplus to pay the dividends for each of the years without invading capital. Moreover, even after the payment of the dividends, the company would still maintain a sizeable earned surplus.

Of course, the mere financial ability to pay a dividend will not justify a court's interference since a corporation has the right to retain earned surplus to insure financial stability and to effect internal policies and programs.⁶⁴ The key question is whether the decision not to declare a dividend clearly demonstrates oppressive

⁶¹It is interesting to note that the *Cole* court did not cite or rely upon the classic case of *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919). The Dodge brothers, who ultimately formed their own automobile company, were minority shareholders of the Ford Motor Company. They sued to compel a dividend out of the corporation's substantial accumulated cash and surplus after Henry Ford, the majority shareholder, had declined to declare dividends. Ford preferred to share corporate gains with the public by reducing the price of Ford cars. In effect, Ford made the company less profitable. After recognizing that corporate managers have a great deal of discretion in determining the use of corporate funds, the Michigan Supreme Court concluded that the company was not a "semi-eleemosynary institution" and affirmed the lower court's decree that a dividend of \$19,275,000 be paid. The *Dodge* case is noted in 20 COLUM. L. REV. 93 (1920); 17 MICH. L. REV. 502 (1919); 28 YALE L.J. 710 (1919).

⁶²Not all authorities agree on this point. See, e.g., *Knapp v. Bankers Sec. Corp.*, 230 F.2d 717 (3d Cir. 1956). See generally 11 FLETCHER § 5326.1; HENN § 360, at 759-60; LATTIN § 145. In effect, *Gordon* has been overruled by statute. N.Y. BUS. CORP. LAW § 627 (McKinney 1954). The *Cole* court stated it was unnecessary to decide the status of the action. 310 N.E.2d at 281 n.5.

⁶³The court again rejected the argument that the plaintiff had failed to exhaust intracorporate remedies. The court noted that a similar contention was raised and rejected in *W.Q. O'Neill Corp. v. O'Neill*, 108 Ind. App. 116, 25 N.E.2d 656 (1940).

⁶⁴See, e.g., *City Bank Farmers Trust Co. v. Hewitt Realty Co.*, 257 N.Y. 62, 177 N.E. 309 (1931); *Jones v. Costlow*, 349 Pa. 136, 36 A.2d 460 (1944). See generally 11 FLETCHER § 5325; HENN § 320; 2 H. O'NEAL, *supra* note 61, § 8.08, at 59-60. For a basic discussion of the accounting principles relevant to dividends, see HENN § 319 and authorities cited *id.* at 633 n.1.

action by the controlling shareholder. In *Cole*, the court concluded that this requirement was satisfied by the showing that Cole had withdrawn all of the earnings of the corporation in salary and compensation in lieu of declaring dividends which, albeit to only a small degree, would be shared by the beneficiaries of the trust represented by the plaintiff bank.⁸⁵ Finally, the court upheld the order against Cole which set off the amount of the judgment against the amount of dividends accruing on her shares. The court followed the rule that a debt of a shareholder owed to a corporation may be set off against a declared dividend, which is, in fact, a debt owed to the shareholders.⁸⁶

D. *Fiduciary Obligations of Corporate Management*

The fiduciary duty of a shareholder of a closely held corporation was a major issue in *Hartung v. Architects Hartung/Odle/Burke, Inc.*,⁸⁷ in which the First District Court of Appeals affirmed a \$17,500 damage judgment against Hartung entered by the Greene County Circuit Court.⁸⁸ The litigation arose out of the short-lived corporate successor to a sole proprietorship headed by Hartung. Odle and Burke, architect employees of Hartung, joined with him as incorporators of the new venture. Each owned equal shares of the corporation and were directors. Hartung was the president of the corporation and Odle and Burke were unspecified officers. The firm's offices and its clients were assigned to the corporation when it was formed. The corporate venture was ill-advised and defendant Hartung resigned approximately four months after the corporation was formed. Odle and Burke individually and as corporate officers then sued for damages caused by a breach of Hartung's fiduciary obligations to the corporation. More particularly, Hartung was charged with usurping corporate opportunities and corporate assets.

Hartung made a three pronged attack on the judgment against him. He claimed that (1) the evidence was insufficient to establish a fiduciary duty, (2) assuming a fiduciary duty existed, the evi-

⁸⁵The plaintiff bank owned only 86 shares and the total amount it would receive as dividends for the seven year period was \$602. It is possible to wonder why the case was not settled long before it got to the appellate level.

⁸⁶See *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N.E. 329 (1913). See also *Harr v. Bankers Sec. Corp.*, 129 Pa. Super. 547, 196 A. 522 (1938); 11 FLETCHER § 5374.

⁸⁷301 N.E.2d 240 (Ind. Ct. App. 1973) (Robertson, J.).

⁸⁸Hartung was also ordered to contribute \$1,362.32 as his co-guarantor's share of a corporate note that had been satisfied by plaintiffs Odle and Burke. Hartung contended that a co-guarantor of a note could not be forced to contribute when the principal obligor had sufficient funds. The court rejected this contention under both the UNIFORM COMMERCIAL CODE § 3-416(1), and the common law. *Hamilton v. Meiks*, 210 Ind. 610, 4 N.E.2d 536 (1936).

dence did not show it had been breached, and (3) even if the duty had been breached, plaintiffs had failed to show specific and non-speculative damages.⁸⁹ On the first issue, the court concluded that Hartung was under a fiduciary duty to act fairly, honestly, and openly with the corporation and his associates in all three of his capacities—as director, officer, and shareholder.

Although directors and officers have long been treated as fiduciaries under Indiana law,⁹⁰ the court relied on two non-Indiana cases to establish Hartung's fiduciary obligation as a shareholder: *Helms v. Duckworth*⁹¹ and *Manis v. Miller*.⁹² *Helms* was an action to cancel a stock purchase agreement which provided that, upon the death of either of the two owners of a corporation, the survivor was entitled to buy the deceased's shares at a price of \$10 or as renegotiated annually by mutual agreement. The price was never changed. The District of Columbia Court of Appeals concluded that, since the defendant, who was the minority shareholder, might never have intended to renegotiate the stock price in line with his agreement, he had breached the duty owed his fellow shareholder. The court enunciated the belief that "the holders of closely-held stock . . . bear a fiduciary duty to deal fairly, honestly, and openly with their fellow stockholders and to make disclosures of all essential information."⁹³

Manis was a contest between the estates of the owners of a corporation who had agreed that neither would sell his stock without first offering it to the other. The agreement further provided that, if the offer were declined, the corporation would be deemed dissolved and either owner could solicit the business of any of its customers. One of the shareholders offered to sell his shares. When the offer was declined, he organized a new corporation and took over the facilities and equipment of the allegedly dissolved corporation. The New York court, in the derivative action, ruled that the takeover was a breach of the shareholder's duty to the corporation,

⁸⁹301 N.E.2d at 242-43.

⁹⁰The court cited *Central Ry. Signal Co. v. Longden*, 194 F.2d 310 (7th Cir. 1952) (officer); *Leader Publishing Co. v. Grant Trust & Savings Co.*, 182 Ind. 651, 108 N.E. 121 (1915) (officer); *Hill v. Nisbet*, 100 Ind. 341 (1885) (director); *Tower Recreation, Inc. v. Beard*, 141 Ind. App. 649, 231 N.E.2d 154 (1967) (director). The *Leader* case is discussed at text accompanying notes 97-99 *infra*. For a general discussion of the fiduciary obligations of corporate personnel, see 3 FLETCHER § 838; HENN §§ 235-42, 268, and authorities cited *id.* at 458 n.3; LATTIN §§ 79-80.

⁹¹249 F.2d 482 (D.C. Cir. 1957).

⁹²19 N.Y.2d 875, 227 N.E.2d 596, 280 N.Y.S.2d 675 (1967). See generally 13 FLETCHER § 5811; HENN § 268; Conway, *The New York Fiduciary Concept in Incorporated Partnerships and Joint Ventures*, 30 FORDHAM L. REV. 297 (1961).

⁹³249 F.2d at 487.

notwithstanding the fact that it was ostensibly permitted by the agreement. The purported dissolution was a nullity, and the duty continued in the absence of the legal dissolution of the corporation.⁹⁴

Hartung made the intriguing argument that, since the "incorporated partnership" consisted of professionals, a fiduciary duty could not arise. His contention, which the court noted was not supported by authority, was that professionals serving clients must have more "leeway" in their relationships with corporate associates. He argued that a stringent fiduciary duty would unduly restrict the freedom needed to maintain his professional status. In rejecting this contention, the court posited that the critical factor giving rise to the duty was not the work product of the corporation but rather was the relationship expected by the principals among themselves and with the corporation. Although it is conceivable that the duty owed corporate associates might be accommodated under some circumstances to the duty owed professional clients, the court was correct in refusing to accept the broad exemption claimed by Hartung.⁹⁵ The court of appeals also rejected Hartung's contention that no duty existed at the time of the alleged breach because he had severed his relationship with the corporation on June 15, 1971. The court concluded that the evidence did not sustain the claim of severance of the relationship, since it appeared that Hartung had maintained sufficient contact until mid-July to maintain, as well, his fiduciary duty.⁹⁶

With respect to Hartung's second argument, the court found that the evidence presented at trial supported the finding that Hartung had breached his duty. His first offense was in taking over the firm's office for his own use while still with the company. Although the lease was on a month-to-month basis, the court concluded the corporation had a sufficient expectancy of renewal to make the

⁹⁴Professor Henn cites both *Manis* and *Helms* for the proposition that, "in the close corporation, not only do the normal fiduciary duties of controlling shareholders apply, but in addition the courts are prone to require a higher standard of fiduciary responsibility." HENN § 268.

⁹⁵Perhaps Hartung's argument would be more persuasive if the corporation involved had been formed under one of Indiana's professional corporation acts. IND. CODE §§ 23-1-13-1 to -11 (Burns 1972) (general); *id.* §§ 23-1-13.5-1 to -6 (Burns Supp. 1974) (accounting); *id.* §§ 23-1-14-1 to -21 (Burns 1972) (medical); *id.* §§ 23-1-15-1 to -21 (dental).

⁹⁶Generally, the fiduciary obligation terminates with the relationship, 19 AM. JUR. 2d *Corporations* §§ 1273, 1282 (1965), but liability will attach for acts commenced during the period of the relationship but completed later. The duty also precludes the use of confidential information obtained before the termination of the relationship. *See, e.g.,* California Intelligence Bureau v. Cunningham, 83 Cal. App. 2d 197, 188 P.2d 303 (1948). *See generally* Comment, *The Obligation of a High-Level Employee to His Former Employer: The Standard Brands Case*, 29 U. CHI. L. REV. 339 (1962).

lease a corporate asset. The court relied on *Leader Publishing Co. v. Grant Trust & Savings Co.*⁹⁷ In *Leader*, the president, who was the major shareholder of a corporation, leased company property to himself rather than transferring it to the trust company as provided in a mortgage. He also leased in his name the building in which the property was located. The Indiana Supreme Court found his actions potentially or constructively fraudulent as against the interests of the corporation and held that he would be deemed to hold title to the property as trustee.⁹⁸ Although *Leader* involved a transaction between the corporation and its president, the *Hartung* court found the principle of the *Leader* case applicable to Hartung's transactions with a third party.⁹⁹

The other actions of Hartung were more serious. The evidence indicated that he contacted clients during the period of corporate turmoil and informed them he would be willing to continue as their architect after withdrawing from the corporation. Some clients subsequently left the corporation. The court applied the well settled principle that a fiduciary cannot lure away business belonging to the corporation.¹⁰⁰ The trial court found that Hartung had persuaded an employee of the firm to join him after he left. This, too, was improper conduct since it is well established that a high level fiduciary can breach his duty by luring away corporate personnel.¹⁰¹ Hartung also sent letters to twenty of the firm's creditors, which letters announced the demise of the enter-

⁹⁷182 Ind. 651, 108 N.E. 121 (1915).

⁹⁸The *Leader* court stated that the private interests of corporate officers must yield to their official duties:

If . . . an officer takes in his own name the title to property conveniently designed for the use of the business of the corporation and occupied by it the law will deem such an act, prima facie, at least, potentially fraudulent as against the corporation and the officer will at the instance of the corporation be held to hold the title as trustee for its use.

Id. at 661, 108 N.E. at 124-25. This was quoted by the *Hartung* court, 301 N.E.2d at 244. For a general discussion of the "corporate opportunity" doctrine, see 3 FLETCHER §§ 861.1 to 867; HENN § 237; LATTIN § 79; Slaughter, *The Corporate Opportunity Doctrine*, 18 SW. L.J. 96 (1964). Of course, the circumstances must be examined to determine if the opportunity is personal to the individual. *Burg v. Horn*, 380 F.2d 897 (2d Cir. 1967).

⁹⁹301 N.E.2d at 244. See also *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955); *Acker, Merrill & Condit Co. v. McGaw*, 106 Md. 536, 68 A. 17 (1907); 3 FLETCHER § 861.

¹⁰⁰The authorities are legion. The court cited *Schildberg Rock Prods. Co. v. Brooks*, 258 Iowa 759, 140 N.W.2d 132 (1966); *Hoggan & Hall & Higgins, Inc. v. Hall*, 18 Utah 2d 3, 414 P.2d 89 (1966). See generally note 98 *supra*.

¹⁰¹See, e.g., *Standard Brands, Inc. v. United States Partition & Packaging Corp.*, 199 F. Supp. 161 (E.D. Wis. 1961); *Duane Jones Co. v. Burke*, 306 N.Y. 172, 117 N.E.2d 237 (1954).

prise and were phrased to give the impression that Odle and Burke had been expelled as business associates. In many of the fiduciary obligation cases, such reprehensible conduct aggravates the situation and often is crucial in a determination of liability.¹⁰²

Hartung's third argument failed when the court concluded that the injury caused Odle and Burke was not speculative or conjectural. More specifically, the fees Hartung received from former corporate clients, plus the expenses and inconveniences suffered by Odle and Burke when they vacated the office and terminated the corporate affairs, sustained the award of \$17,500.

E. Agency Authority and Joint Ventures

Several agency concepts were involved in the per curiam decision of the Second District Court of Appeals in *Storm v. Marsischke*,¹⁰³ which affirmed a judgment of the Marion County Superior Court dismissing the complaint against defendant, McCormick Lumber, at the end of plaintiff's case. The complaint alleged that McCormick Lumber, acting through employee Winters, had become bound on a construction contract between the Storms and the other defendants¹⁰⁴ or at least had entered into a joint venture with them. The contracting parties had been brought together by Winters, who had represented to the Storms that the lumber company would enter into the contract with them. At the time of the signing, however, Winters told the Storms that the lumber company would act only as a supplier and would not be a party to the contract.

Plaintiffs first argued that Winters had actual or apparent authority to negotiate for and bind the company on the construction contract. The court did not discuss the actual authority issue but only made a passing reference to the fact that there was no substantial evidence that Winters was a "general agent." The court also rejected the apparent authority argument because there was no showing that McCormick manifested to them that Winters had the claimed authority.¹⁰⁵ To bind the company on this theory, plaintiffs had the burden of showing that the company had held out Winters as a general agent, or as a special agent clothed with

¹⁰²See Comment, *The Obligation of a High-Level Employee to His Former Employer: The Standard Brands Case*, 29 U. CHI. L. REV. 339 (1962).

¹⁰³304 N.E.2d 840 (Ind. Ct. App. 1974).

¹⁰⁴A default judgment had been entered prior to trial against Marsischke, Wagner and the Duane Construction Company.

¹⁰⁵304 N.E.2d at 842. The court cited *Kody Eng'r Co. v. Fox & Fox Ins. Agency, Inc.*, 303 N.E.2d 307 (Ind. Ct. App. 1973); *State Life Ins. Co. v. Thiel*, 107 Ind. App. 75, 20 N.E.2d 693 (1939). For a general discussion of apparent authority, see RESTATEMENT (SECOND) OF AGENCY §§ 8, 27 (1958); SEAVEY § 8D.

more authority than actually conferred,¹⁰⁶ and that plaintiffs had reasonably relied on this representation. The key is proof of affirmative action on the part of the principal.¹⁰⁷

The court concluded there was no substantial evidence that Winters had been clothed with the appearance of authority. He had contacted the Storms when he heard of their plans and introduced them to Marsischke and Wagner; thus the Storms might have thought they were negotiating with the lumber company. The court, in fact, conceded there was a "suspicion" that the lumber company was involved in the project. However, the Storms should have realized that this notion was mistaken when they signed a contract naming the Duane Construction Company as the contractor. Winters' comment that the company "normally conducted its business in this manner"¹⁰⁸ had to be discounted since an agent's statements are irrelevant in establishing his authority.

A second, and somewhat more persuasive argument, was that Winters possessed inherent authority¹⁰⁹ to bind the lumber company. The *Storm* court stated that there was no Indiana case which expressly recognized the principle but noted that *Farm Bureau Mutual Insurance Co. v. Coffin*¹¹⁰ possibly applied the underlying rationale. The theory was rejected here since the Storms had failed to show that Winters was a general agent.

Plaintiffs' final argument was that it was error not to find the lumber company a partner or joint venturer with the construction company. The premise of this argument was that the president of McCormick Lumber was also a director of a successor corporation to the construction company. The court recognized that the corporate fiction can be disregarded to prevent fraud or injus-

¹⁰⁶*Farm Bureau Mut. Ins. Co. v. Coffin*, 136 Ind. App. 12, 186 N.E.2d 180 (1962).

¹⁰⁷304 N.E.2d at 843, *quoting from* *Pan Am. World Airways, Inc. v. Local Readers Serv., Inc.*, 143 Ind. App. 370, 377, 240 N.E.2d 552, 556 (1968). *See generally* RESTATEMENT (SECOND) OF AGENCY § 285 (1958); SEAVEY § 75D (1964).

¹⁰⁸304 N.E.2d at 843.

¹⁰⁹This concept, which often overlaps with apparent authority, exists apart from any manifestation or holding out by the principal. Rather it rests solely on the agency relationship, *i.e.*, the agent has a certain authority simply by being employed in a capacity that would normally carry the authority contemplated or perceived by the third party. For a general discussion of the principle of inherent agency power, see RESTATEMENT (SECOND) OF AGENCY § 8A (1958); SEAVEY § 59D. The court noted, 304 N.E.2d at 844 n.5, that a special agent has been recognized as possessing inherent agency power but that this issue had not been presented. *See generally* RESTATEMENT (SECOND) OF AGENCY § 161A (1958).

¹¹⁰136 Ind. App. 12, 186 N.E.2d 180 (1962).

tice¹¹¹ but concluded that a common board alone was insufficient to negate the existence of separate legal entities. The court relied on *Hart, Schaffner & Marx v. Campbell*,¹¹² in which it was held that, absent fraud or bad faith, the mere fact that the officers of one corporation were the shareholders, directors and officers of another did not justify a conclusion that the independent legal existence of the second corporation should be ignored.

The plaintiffs contended that *Voorhees-Jontz Lumber Co. v. Bezek*¹¹³ supported their argument that a joint venture existed between the lumber company and the construction company. In *Voorhees-Jontz*, the court held that two similar corporations were acting in concert but, in *Storm*, as the court pointed out in distinguishing the case, there was no history of prior practices that would justify a finding that McCormick Lumber was either directly or through authorized agents referring parties to the construction company under the representation that the two worked together.

F. Notification of Change of Ownership

*Meggs v. Central Supply Co.*¹¹⁴ is another case illustrating the importance of observing legal formalities in conducting business transactions. The suit was brought by a supplier against both the present and former owners of a sole proprietorship to recover for merchandise ordered after the sale of the business. Meggs, the former owner, had some dealings with Central Supply in the past. Meggs did not notify his suppliers of the sale of the business at the time it was sold, although written notice was eventually sent to Central Supply. The Henry County Circuit Court entered a judgment against Meggs for supplies ordered after the business was sold and before the notice was received. The First District Court of Appeals affirmed.¹¹⁵

The court did not expressly articulate the theory of liability but apparently used the doctrines of equitable estoppel and fraudulent or negligent misrepresentations.¹¹⁶ The court relied on general

¹¹¹The court cited *Feucht v. Real Silk Hosiery Mills, Inc.*, 105 Ind. App. 405, 12 N.E.2d 1019 (1938). See also *In re Clarke's Will*, 204 Minn. 574, 578-79, 284 N.W. 876, 878 (1939). For a general discussion of the appropriateness of disregarding the corporate fiction in certain situations, see 1 FLETCHER §§ 41-46; HENN §§ 138, 146-49; LATTIN §§ 11, 13-18.

¹¹²110 Ind. App. 312, 320-21, 38 N.E.2d 895, 899 (1942).

¹¹³137 Ind. App. 382, 209 N.E.2d 380 (1965).

¹¹⁴307 N.E.2d 288 (Ind. Ct. App. 1974) (Lowdermilk, J.). Although the *Meggs* case involved a sole proprietorship, a similar situation might arise upon the sale of a corporation.

¹¹⁵*Id.* at 289. The other defendant, the purchaser Brown, defaulted.

¹¹⁶*Id.* at 292. See generally J. CRANE & A. BROMBERG, LAW OF PARTNERSHIP § 36 (1968).

authority¹¹⁷ and an Indiana case, *Elverson v. Leeds*,¹¹⁸ which had not been discovered by the parties. In *Elverson*, a supplier recovered from the former owner of a greenhouse for supplies ordered in the firm name by the former owner's son who had purchased the business. As in *Meggs*, the suppliers had not been informed of the sale. The *Elverson* court concluded that, between the former owner and her son, there was neither a principal-agency relationship nor a partnership that would have required the retiring partner to notify creditors.¹¹⁹

However, the *Elverson* court did analogize to the partnership situation, reasoning that a third party dealing with a business has the right to assume that the supposed owner will be liable for the firm's orders until there is notification to the third party of a change in ownership.¹²⁰ The key to liability under *Elverson* is that the new owner must use the firm name with the knowledge, consent and approval of the former owner. This element was satisfied in *Meggs* by the showing that the business name and goodwill of the enterprise were among the assets sold by Meggs. The key to escaping liability under *Elverson* is a showing that the supplier had actual or constructive knowledge of the transfer of the business. Constructive knowledge, for example, from a newspaper disclaimer of liability, might suffice for tradepersons who were familiar with the firm but had no actual dealings with it. However, actual notice is the only sure technique by which a former owner may escape liability to those with whom he has had prior dealings.

¹¹⁷Hendley v. Bittinger, 249 Pa. 193, 94 A. 831 (1915); 52 AM. JUR. Trademarks § 38 (1944).

¹¹⁸97 Ind. 336 (1884). The court referred to *Elverson* as a "hog" case presumably because the case was discovered while "rooting through the archives." 307 N.E.2d at 290.

¹¹⁹The Indiana Uniform Partnership Act, IND. CODE § 23-4-1-35 (Burns 1972), provides that a partner can bind a dissolved partnership to third persons who had neither actual nor constructive notice of the dissolution. *Id.* § 23-4-1-16 provides that a person who permits another to represent him as a partner to third persons is liable to such third persons. See generally J. CRANE & A. BROMBERG, LAW OF PARTNERSHIP §§ 80-82 (1968).

¹²⁰The *Elverson* court pointed out that in either case, whether one is engaged in a partnership or in a business under an assumed name, the result should be the same:

Third parties are just as likely to lend their credit, and just as likely to be defrauded as though she were a retiring partner; . . . She engages in business under a firm name, which imports a partnership, and the business continues under such name, without any notice that she has ceased her connection with it. Why should she not be treated like such partner, and held to the same obligations?

97 Ind. at 339.

G. Statutory Developments

The 1974 session of the 98th Indiana General Assembly adopted several significant amendments to the Indiana General Corporation Act and to other provisions of the Indiana Code relating to corporate affairs.¹²¹

1. Class Voting of Shares

The provision of the General Corporation Act specifying the shareholders entitled to vote on proposed amendments to articles of incorporation was revised by deleting subsection (b), which provided that a series of shares of a class would be treated as a separate class for purposes of class voting.¹²² This particular subsection has had an unusual legislative career and it is difficult to divine the legislative intent. The provision was not included when Indiana Code section 23-1-4-4 was adopted in its present form in 1967,¹²³ but the provision was added by the General Assembly in 1969.¹²⁴ Thus the recent amendment returned the section to its

¹²¹Other acts passed by the General Assembly that deserve noting include: (1) Ind. Pub. L. No. 125 (Feb. 20, 1974), *amending* IND. CODE § 27-8-5-10 (IND. ANN. STAT. § 39-4260, Burns Supp. 1974) (to allow coordination of benefits under group hospital, medical or surgical expense policies); (2) Ind. Pub. L. No. 130 (Feb. 15, 1974), *amending* the Indiana Credit Union Act, IND. CODE §§ 28-7-1-1 *et seq.* (Burns Supp. 1974) (to permit state chartered credit unions to compete more effectively with federal credit unions); (3) Ind. Pub. L. No. 121 (Feb. 14, 1974), *amending* IND. CODE § 27-1-12-2 (IND. ANN. STAT. § 39-4202, Burns Supp. 1974) (to permit the investment of certain insurance company funds in mutual funds); (4) Ind. Pub. L. No. 123 (Feb. 14, 1974), *amending* IND. CODE § 27-1-20-20 (IND. ANN. STAT. § 39-5020, Burns Supp. 1974) (to permit insurance companies to publish financial statements prepared on a basis other than the accounting method required by the Insurance Department); (5) Ind. Pub. L. No. 150 (Feb. 13, 1974), *amending* the Offenses Against Property Act, IND. CODE § 35-17-5-13 (IND. ANN. STAT. § 10-3040, Burns Supp. 1974) (to permit the inference that the owner of property is a corporation); (6) Ind. Pub. L. No. 124 (Feb. 15, 1974), *amending* IND. CODE § 27-4-1-4 (IND. ANN. STAT. § 39-5304, Burns Supp. 1974) (to make it an unfair or deceptive practice for insurance companies to refuse to make payments under health and hospital insurance policies to for-profit medical facilities); (7) Ind. Pub. L. No. 127 (Feb. 15, 1974), *amending* IND. CODE § 28-1-2-2 (Burns Supp. 1974) (to increase the size of the Indiana Department of Financial Institutions in order to admit a representative from state chartered credit unions).

¹²²Ind. Pub. L. No. 112 (Feb. 12, 1974), *amending* IND. CODE § 23-1-4-4 (Burns Supp. 1974). The act was deemed an emergency measure and became effective upon passage.

¹²³Ch. 275, § 23, [1967] Ind. Acts 811 (codified at IND. CODE § 23-1-4-4 (Burns Supp. 1974)).

¹²⁴Ch. 187, § 11, [1969] Ind. Acts 508 (repealed 1974).

original form, which was derived from the Model Business Corporation Act.¹²⁵

The General Assembly no doubt reasoned that the owners of a series of shares of a class should not have a greater proportional say in passing on amendments than they would have if the shares had been issued as a class. In fact, the former provision made it possible for a small group of shareholders of a company with one class but several series of shares to defeat an amendment overwhelmingly approved by the other owners of the corporation even when the proposed amendment did not have a significant impact on the series shareholders' rights or interests. The possibility of such a veto might well have been the motivation behind deleting subsection (b).

However, the General Assembly may have gone too far. A concern about an unjustified veto power is legitimate, but it is conceivable that an amendment to the articles of incorporation would affect the interests of only one series. In such a case, a veto power might well be appropriate. Although Indiana appears to be the only state that treated a series of a class as a separate class for all votes, the comments to section 60 of the Model Business Corporation Act indicate that several Model Act states provide that a series shall vote as a class when that series, but no other, will be affected by a proposed amendment or when the effect on that series differs from the effect on other series.¹²⁶ The comments also indicate that several non-Model Act jurisdictions mandate that a series vote as a class when affected by a proposed amendment.¹²⁷ This appears to be an eminently reasonable compromise between the interests of the corporation and the interests of series' owners, and the General Assembly might well consider another change to section 23-1-4-4 in the next session.

2. Professional Accounting Corporations

Another significant development in the corporate area was the adoption of the Professional Accounting Corporation Act.¹²⁸

¹²⁵2 ABA-ALI MODEL BUS. CORP. ACT ANN. § 60 (1971). See Deer & Burns, *The 1967 Amendments to the Indiana General Corporation Act*, 43 IND. L.J. 14, 28 (1967).

¹²⁶2 ABA-ALI MODEL BUS. CORP. ACT ANN. § 60, comment ¶ 3.02 (1971), indicates that Connecticut, Georgia, Illinois, Virginia and Wisconsin have such a provision.

¹²⁷*Id.* comment ¶ 3.03 indicates that Delaware, Florida, Massachusetts, New Jersey, New York and Oklahoma have different statutory provisions that require a series vote when a series will be affected by a proposed amendment.

¹²⁸Ind. Pub. L. No. 113 (Feb. 18, 1974), *amending* IND. CODE §§ 23-1-13.5-1 to -6 (Burns Supp. 1974). The act took effect on July 1, 1974, under an

Although Indiana has had professional corporation acts for a number of years,¹²⁹ the approach of the Accounting Corporation Act differs significantly from the others. It is a totally different statute rather than an adaptation. It is also somewhat less complex than the others.

The Act establishes shareholder qualifications and imposes certain restrictions on the management of accounting corporations. The qualifications and restrictions depend on whether the corporation is a corporation of certified public accountants,¹³⁰ a corporation of public accountants¹³¹ or a corporation of accounting practitioners.¹³² Unlike the other three professional corporation acts that have specific provisions relating to corporate names,¹³³ voting trust restrictions,¹³⁴ conflicts of interest,¹³⁵ annual reports and certifications,¹³⁶ and reporting of ownership changes,¹³⁷ section 1 of the Accounting Corporation Act simply provides that:

One or more individual persons may organize a corporation for the practice of public accounting under the general corporation law. The corporation shall not be

emergency provision. Although there are other benefits deriving from the incorporation of a professional practice, such as unlimited duration and limited liability on non-professional matters, the prime motivation for using the corporate form has been the tax benefits available to corporations and their employees. These benefits traditionally have been unavailable to sole practitioners or partnerships. *See generally* HENN § 77. The legal periodicals are replete with articles discussing tax considerations for professional corporations. *See, e.g.,* Levenfeld, *Professional Corporations and Associations*, 8 HOUSTON L. REV. 47 (1970); Overbeck, *Current Status of Professional Associations and Professional Corporations*, 23 BUS. LAW. 1203 (1968); Strong & Holdsworth, *Incorporating a Professional Practice—A Comprehensive Checklist*, 16 PRAC. LAW. 69 (May, 1970); Weinberg, *A Brief Look at the Advantages and Disadvantages of Professional Incorporation*, 6 CREIGHTON L. REV. 17 (1973). It should be noted that the liberalization of benefits available to self-employed persons under the Keogh Act, 26 U.S.C. §§ 401-04 (1970), has somewhat reduced the drive toward professional incorporation.

¹²⁹IND. CODE §§ 23-1-13-1 to -11 (Burns 1972) (General Professional Corporation Act); *id.* §§ 23-1-14-1 to -21 (Medical Professional Corporation Act); *id.* §§ 23-1-15-1 to -21 (Dental Professional Corporation Act). Attorneys can incorporate under the General Act pursuant to an order of the Indiana Supreme Court effective April 10, 1970. Order in the Matter of Professional Corporations, 253 Ind. xxviii (1970).

¹³⁰IND. CODE § 23-1-13.5-4 (Burns Supp. 1974).

¹³¹*Id.* § 23-1-13.5-5.

¹³²*Id.* § 23-1-13.5-6.

¹³³*Id.* §§ 23-1-13-5 (general), -14-7 (medical), -15-7 (dental) (Burns 1972).

¹³⁴*Id.* §§ 23-1-13-8 (general), -14-11 (medical), -15-11 (dental).

¹³⁵*Id.* §§ 23-1-13-11 (general), -14-17 (medical), -15-17 (dental).

¹³⁶*Id.* §§ 23-1-13-11 (general), -14-19 (medical), -15-19 (dental).

¹³⁷*Id.* §§ 23-1-13-11 (general), -14-20 (medical), -15-20 (dental).

required to have more directors than shareholders, but at least one director shall be a shareholder. The other directors need not, but may, be shareholders.¹³⁸

The Act requires stock purchase agreements to keep shares from nonqualified persons but contains nothing comparable to the detailed stock purchase and valuation provisions of the other acts.¹³⁹

Not surprisingly, the new Act recognizes the role of the Indiana State Board of Public Accountancy in the regulation of the profession. The Act specifically provides that persons associated with accounting corporations who practice within Indiana, as well as the corporations themselves, are subject to the authority of the Board to the same extent as partnerships.¹⁴⁰ Since there might be differences between a partnership practice and a corporate practice, the General Assembly authorized the Board to issue further corporate regulations consistent with or required by the public welfare.¹⁴¹

As noted, the requirements for the three types of accounting corporations vary. Common to all is the requirement that the sole purpose and business of the corporation be to furnish services not inconsistent with the accountancy law and the regulations of the Board. However, in a corporation of certified public accountants, the corporate managers and all but one shareholder may be certified public accountants of other states.¹⁴² Here the Act no doubt contemplates nationwide accounting firms. Shareholders and managers actually practicing in the state must be licensed in Indiana.¹⁴³ The relevant sections of the Act for public accounting and accounting practitioner corporations require that all persons associated with the corporation be licensed in Indiana.¹⁴⁴

The Accounting Corporation Act permits foreign accounting corporations to render professional services in Indiana if the services are consistent with the regulations of the Board and if the foreign corporations are registered with the Board.¹⁴⁵ The other

¹³⁸*Id.* § 23-1-13.5-1 (Burns Supp. 1974). The main requirement is that all shareholders must be licensed accounting professionals.

¹³⁹*Compare id.* §§ 23-1-13.5-4(e), -5(d) and -6(d), with *id.* §§ 23-1-14-18 and -15-18 (Burns 1972).

¹⁴⁰*Id.* § 23-1-13.5-3 (Burns Supp. 1974). The Indiana Public Accountancy Law is *id.* §§ 25-2-1-1 to -23.

¹⁴¹*Id.* § 23-1-13.5-3 provides that the Board may prescribe regulations concerning the name of the corporation, affiliations with other organizations, and the liability of shareholders.

¹⁴²*Id.* § 23-1-13.5-4(b) to (d).

¹⁴³*Id.* § 23-1-13.5-4(d).

¹⁴⁴*Id.* §§ 23-1-13.5-5(b) & (c) (public accounting corporation), -6(b) & (c) (accounting practitioner corporation).

¹⁴⁵*Id.* § 23-1-13.5-2.

professional corporation acts prohibit mergers or consolidations with foreign corporations.¹⁴⁶ The Accounting Corporation Act is silent on this point, but presumably mergers or consolidations are permitted pursuant to the applicable provisions of the General Corporation Act¹⁴⁷ so long as the surviving or new corporation complies with the Act.

3. *Not-for-Profit Corporations—Indemnification of Corporate Personnel and Liability Insurance*

The General Assembly belatedly recognized that officers and directors of Indiana not-for-profit corporations are as entitled to indemnification for expenses incurred in defending lawsuits as are their counterparts in general corporations or Indiana insurance corporations. The General Assembly also recognized that such corporations should be empowered to purchase and maintain liability insurance for corporate personnel. These recognitions were accomplished by the addition of two new subsections, (b) (9) and (b) (10), to the general powers section of the Indiana Not-For-Profit Corporation Act.¹⁴⁸ The action was belated, however, since the General Corporation Act has had an indemnification provision since 1959¹⁴⁹ and the Indiana Insurance Law has had one since 1973.¹⁵⁰ In addition, corporations under those two acts were authorized to purchase what is commonly called "director and officer" or "D & O" insurance in 1973.¹⁵¹

The not-for-profit insurance provision, subsection (b) (10), is identical to the provisions added to the other acts in 1973. However, the not-for-profit indemnification provision, subsection (b) (9), differs from the comparable indemnification section of the General Corporation Act and the reason for this difference is not apparent. It is possible that there was no intent to treat not-for-profit corporations differently. Subsection (b) (9) is the same as the pre-1973 General Corporation Act indemnification provision except that, in subsection (b) (9), indemnification is limited to de-

¹⁴⁶*Id.* §§ 23-1-13-10 (general), -14-21 (medical), -15-21 (dental) (Burns 1972).

¹⁴⁷*Id.* §§ 23-1-11-15, -16.

¹⁴⁸Ind. Pub. L. No. 114 (Feb. 12, 1974), *amending* IND. CODE § 23-7-1.1-4 (b) (9) & (10) (Burns Supp. 1974).

¹⁴⁹IND. CODE § 23-1-2-2(b) (9) (Burns Supp. 1974).

¹⁵⁰Ind. Pub. L. No. 271 (April 13, 1973), *amending* IND. CODE § 27-1-7-2 (b) (8) (IND. ANN. STAT. § 39-3702(b) (8), Burns Supp. 1974).

¹⁵¹IND. CODE § 23-1-2-2(b) (10) (Burns Supp. 1974) (General Corporation Act); *id.* § 27-1-7-2(b) (9) (IND. ANN. STAT. § 39-3702(b) (9)) (Insurance Law). For a discussion of the 1973 amendments, see Galanti, *Corporations, 1973 Survey of Indiana Law*, 7 IND. L. REV. 77, 103-09 (1973).

fenses of civil actions and does not extend to defenses of criminal actions. Thus, the drafters may have inadvertently, rather than intentionally, used a superseded statutory provision as a model. Whatever the explanation, the inescapable fact is that the indemnification provisions are different.

In fact, the indemnification provision is inconsistent with the insurance provision. The insurance provision refers to "directors, officers, employees or agents" of the corporation, whereas the indemnification provision refers only to "directors or officers." The indemnification provisions of both the General Corporation Act and the Insurance Law authorize indemnification of corporate personnel other than directors and officers.¹⁵² The failure to include these additional corporate personnel in the not-for-profit indemnity provision might, therefore, seem a step backward, but the problem may be more apparent than real. As is common to statutory indemnification provisions,¹⁵³ subsection (b) (9) is not exclusive and does not impair rights that might be authorized by provisions in the articles of incorporation, bylaws, or other corporate acts or documents.¹⁵⁴ Presumably, indemnification for employees or agents of a corporation can be authorized by these methods. However, it is possible that a court might strictly construe subsection (b) (9) to

¹⁵²This is also the position of the drafters of the Model Business Corporation Act. See 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5 (1971). The Model Act annotation lists Connecticut, Massachusetts and Minnesota as authorizing indemnification of agents and employees as well as officers and directors. Employees are included in the California, Ohio, Rhode Island, and South Carolina statutes. Connecticut goes still farther and protects the shareholders of a corporation as does North Carolina under some circumstances. *Id.* at 227. The protection accorded employees and agents is apart from whatever protection they enjoy under the general principles of agency law. See HENN § 379, at 800 n.2; RESTATEMENT (SECOND) OF AGENCY §§ 439-40 (1958); SEAVEY § 168.

¹⁵³The Model Act indemnification provision is nonexclusive as apparently are the statutes in the majority of jurisdictions. 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5, at 225 (1971). See HENN § 380, at 806; LATTIN § 78, at 281 & § 114, at 449-50. See also L. RATNER, PROTECTING THE CORPORATE OFFICER AND DIRECTOR FROM LIABILITY (1970); Jervis, *Corporate Agreements to Pay Directors' Expenses in Stockholders Suits*, 40 COLUM. L. REV. 1192 (1940).

¹⁵⁴See HENN §§ 379-80; LATTIN §§ 78, 114. There is authority which cautions against over-reliance on such a provision when the indemnification goes substantially beyond the statute or when it could be characterized as unjust or inequitable. *Teren v. Howard*, 322 F.2d 949 (9th Cir. 1963). Another risk is that a poorly drafted bylaw or other indemnification provision could be deemed as restricting rather than expanding available indemnification. See *Essential Enterprises Corp. v. Dorsey Corp.*, 182 A.2d 647 (Del. Ch. 1962). See generally Loftin, *Indemnification of Corporate Executives*, 1 LIABILITIES OF CORPORATE OFFICERS AND DIRECTORS 69 (1968).

preclude such indemnification, thus limiting employees and agents of not-for-profit corporations to the insurance protection authorized by subsection (b) (10).

In contrast with the provisions of the other two acts which permit indemnification of expenses incurred in defending both civil and criminal suits, the not-for-profit provision is limited to civil actions.¹⁵⁵ It is understandable that the General Assembly would not want a corporation to pay fines imposed on a director or officer, but there is no reason why not-for-profit directors or officers, like their for-profit counterparts, should not be indemnified for expenses incurred in successfully defending criminal prosecutions. Of course, the nonexclusive nature of the provision would probably be helpful here.

Subsection (b) (9) limits indemnification to "expenses actually and reasonably incurred . . . in connection" with the defense, while the current General Corporation Act provision only limits indemnification to those expenses "reasonably incurred."¹⁵⁶ Presumably the "actually and reasonably incurred" language was carried over from the pre-1973 General Corporation Act provision¹⁵⁷ and was included because the legislature was concerned that deleting "actually" would encourage a less careful attitude in defending actions. Unfortunately, retaining "actually" might preclude a corporation from making advances to finance a defense or making payments directly to a third party such as an attorney, thus forcing the defendant to pay and then seek reimbursement.¹⁵⁸

As it did in 1973 when the other two acts were amended, the General Assembly failed to specify whether settlement expenses are covered by subsection (b) (9).¹⁵⁹ Another apparent oversight was the omission of language authorizing indemnification of expenses incurred in defending claims or actions "arising out of a person's

¹⁵⁵Compare IND. CODE § 23-7-1.1-4(b) (9) (Burns Supp. 1974), with *id.* § 23-1-2-2(b) (9), and *id.* § 27-1-7-2(b) (8) (IND. ANN. STAT. § 39-3702(b) (8)).

¹⁵⁶Compare IND. CODE § 23-7-1.1-4(b) (9) (Burns Supp. 1974), with *id.* § 23-1-2-2(b) (9). See Galanti, *supra* note 151, at 106. The Model Act refers to "actually and reasonably." 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5 (1971).

¹⁵⁷Ch. 24, § 1, [1959] Ind. Acts 73, as amended, ch. 187, § 1, [1969] Ind. Acts 491.

¹⁵⁸See Galanti, *supra* note 151, at 106.

¹⁵⁹*Id.* Some indemnification provisions specifically refer to settlement expenses. See 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5(a) (1971); HENN § 380, at 811 nn.46-49. It is, of course, possible that settlement expenses might be expenses "reasonably incurred" in defending a claim and might also be covered in a provision in the articles of incorporation, or the bylaws, or otherwise as authorized by the nonexclusive proviso of IND. CODE § 23-7-1.1-4(b) (9) (Burns Supp. 1974).

status" as an officer or director.¹⁶⁰ The officers and directors of not-for-profit corporations are limited to claims based on acts done in their official capacities and may not seek indemnity for claims that might arise simply because they are officers or directors.¹⁶¹

Similar to the provisions of the other two acts, the indemnification provision is not liberal toward persons who have not been completely successful in defending suits. This contrasts with statutes in some jurisdictions, the Model Business Corporation Act,¹⁶² and even the indemnification provisions of other Indiana statutes.¹⁶³ These statutes do permit indemnification for the unsuccessful defendant if he has at least met prescribed standards, such as "acting in good faith and in a manner reasonably believed to be in or not opposed to the best interest of the corporation, and, with respect to any criminal actions or proceeding, had no reasonable cause to believe his conduct was unlawful."¹⁶⁴ To prohibit wrongdoers from seeking indemnification for all unsuccessful defenses, these statutes often adopt various techniques for an independent determination that indemnification is proper. These techniques include advice of independent legal counsel, ratification by disinterested directors or by shareholders, or an order by the court hearing a derivative action.¹⁶⁵

Subsection (b) (9) permits the indemnification of persons serving as officers or directors of other corporations on behalf of the not-for-profit corporation. However, this indemnification provision applies only to corporate business enterprises and not to partnerships, joint ventures, trusts or other enterprises as permitted

¹⁶⁰See 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5, at 219-20 (1971).

¹⁶¹See generally Galanti, *supra* note 151, at 106 n.144; Knepper, *Corporate Indemnification and Liability Insurance for Corporation Officers and Directors*, 25 SW. L.J. 240 (1971). Again, the nonexclusive proviso may be of some help. See note 159 *supra*.

¹⁶²1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5, at 227-28 (1971). See generally HENN § 380, at 809-11; Galanti, *supra* note 151, at 107.

¹⁶³See IND. CODE § 28-1-5-2(b) (8) (Burns Supp. 1974), which authorizes commercial banks to indemnify trustees or officers against expenses and amounts paid in settlement in certain actions, and Ind. Pub. L. No. 129 (Feb. 15, 1974), amending IND. CODE § 28-6-1-45 (Burns Supp. 1974), which accords similar protection to trustees and officers of savings banks.

¹⁶⁴1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5(a) & (b), at 214 (1971). See generally HENN § 380, at 809-11. This so-called business judgment rule has afforded a great deal of protection against liability for errors and conduct. See *Freeman v. Hare & Chase, Inc.*, 16 Del. Ch. 207, 142 A. 793 (1928); *Symposium—Officers' and Directors' Responsibilities and Liabilities*, 27 BUS. LAW. 1 (1972).

¹⁶⁵For the jurisdictions adopting the various techniques, see 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5, at 231-35 (1971); HENN § 380, at 810 n.38.

under the General Corporation Act.¹⁶⁶ Again, the probable explanation is that pre-1973 statutory language was used as a model. However, the limitation is not significant since not-for-profit corporations are less likely than for-profit corporations to be involved in non-corporate business enterprises. Nonetheless, the General Assembly might well be advised to amend section 23-7-1.4-4 of the Indiana Not-For-Profit Corporation Act to conform to the General Corporation Act and the Insurance Law, for reasons of symmetry and also because officers and directors of not-for-profit corporations should be treated equally with their for-profit or insurance counterparts.

Subsection (b) (10), the insurance provision, is the same as in the General Act and the Insurance Law.¹⁶⁷ The provision is based on the relevant section of the Model Act¹⁶⁸ and authorizes insurance even in those cases when the not-for-profit corporation could not grant indemnification under subsection (b) (9). Conceivably this provision could cause corporate personnel to be less careful in fulfilling their duties to the corporation, but no doubt public policy would preclude insuring against gross negligence, self-dealing, or conduct amounting to total abdication of corporate responsibilities.¹⁶⁹ This assumes, of course, that insurance covering such acts could be found. As Professor Bishop points out in his excellent article on indemnification, insurers are not inclined to develop or retain insurance policies which might serve to increase the risks insured against.¹⁷⁰ The self-interest of insurance companies would assure that "D & O" insurance would not be counter-productive. More likely, a court would limit the provision to situations involving ordinary negligence in the performance of a duty to the corpora-

¹⁶⁶IND. CODE § 23-1-2-2(b) (9) (Burns Supp. 1974). See Galanti, *supra* note 151, at 105.

¹⁶⁷IND. CODE § 23-1-2-2(b) (10) (Burns Supp. 1974) (General Corporation Act); *id.* § 27-1-7-2(b) (9) (IND. ANN. STAT. § 39-3702(b) (9)) (Insurance Law). See generally Galanti, *supra* note 151, at 107-09.

¹⁶⁸1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 5(g) (1971).

¹⁶⁹For a general discussion of liability insurance, see HENN § 380, at 812; Bishop, *Sitting Ducks and Decoy Ducks: New Trends in Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1087 (1968); Knepper, *Corporate Indemnification and Liability Insurance for Corporation Officers and Directors*, 25 SW. L.J. 240 (1971); Kroll, *Some Reflections on Indemnification Provisions and S.E.C. Liability Insurance in the Light of Barchris and Globus*, 24 BUS. LAW. 681, 687-92 (1969).

¹⁷⁰Bishop, *Sitting Ducks and Decoy Ducks: New Trends in Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1094 (1968). For a discussion of the terms of a typical "D & O" policy and an evaluation checklist, see Hinsey & DeLancey, *Directors and Officers Liability Insurance—An Approach to its Evaluation and a Checklist*, 23 BUS. LAW. 869 (1968).

tion. Under this construction, the indemnification insurance provision would be no more harmful to the public interest than is automobile liability insurance.

IV. Civil Procedure and Jurisdiction

*William F. Harvey**

The following survey of Indiana cases is intended as an overview of significant developments in the area of civil procedure and jurisdiction during the judicial term extending from May, 1973, through May, 1974. Because the discussion is synoptic in nature, it does not purport to provide either exhaustive coverage or extensive analysis of the cases.

A. Jurisdiction and Service of Process

Indiana's long-arm statute¹ has been the subject of interpretation this past year in the federal courts. In *Valdez v. Ford, Bacon & Davis, Texas, Inc.*,² Judge Sharp, in a memorandum opinion, espoused a liberal construction of the scope of Trial Rule 4.4. In reviewing historical precedents and scholarly exegeses of the rule, he found that:

Indiana Trial Rule 4.4 is intended to extend personal jurisdiction of courts sitting in this State, including this one in this case, to the limits permitted under the due process clause of the Fourteenth Amendment.³

The question of the scope of Trial Rule 4.4 arose on the motion of Texas Tank, Inc., one of the defendants, to dismiss under Federal Rule of Civil Procedure 12(b) (2) for lack of jurisdiction over the person. In connection with this motion, Texas Tank asserted that the service of process made upon it by certified mail to its office in Dallas, Texas, was impermissible under Federal Rule of Civil Procedure 4 and could only be allowed by incorporating into the federal rule the service of process procedures of Indiana, particularly Trial Rule 4.4.

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The author wishes to extend his appreciation to Susan B. Tabler for her assistance in the preparation of this discussion.

¹IND. R. TR. P. 4.4.

²62 F.R.D. 7 (N.D. Ind. 1974).

³*Id.* at 14.

The motion to dismiss was denied on the facts alleged in the complaint. The diversity suit, based on products liability stemming from an explosion of a sulphur recovery unit in Indiana, named as defendants the out-of-state manufacturer, designers, suppliers, and vendors of the unit. The court suggested that jurisdiction was proper under liberal interpretations of Trial Rule 4.4(A) (1), (3), and (4) and that, regardless of the theory applied, the necessary "minimum contacts" with Indiana were shown.⁴ Finding Trial Rule 4.4 sufficiently encompassing to uphold Indiana's interest in the application of its laws to permit recovery for injuries inflicted within its borders, the court sustained jurisdiction over the protesting defendant.

In the case of *Warner Press, Inc. v. Warner Books, Inc.*,⁵ Chief Judge Steckler of the United States District Court for the Southern District of Indiana expanded the concept of "causing harm" under Trial Rule 4.4(A) (3) to include the sale of publications infringing the trademark laws. The suit for trademark infringement and unfair competition arose from the sale and distribution in Indiana of the allegedly infringing publications by the defendant's independent contractors. The defendant moved to dismiss for lack of jurisdiction over the person and for improper federal venue. The court denied the motion, holding that, even though all the publications were sold to an independent contractor in another state and the independent contractor was in turn responsible for the distribution of the publications in Indiana, the court had jurisdiction pursuant to the "causing harm" concept of Trial Rule 4.4(A) (3) and therefore the non-resident publisher was amenable to service. Thus, according to the opinion, it was immaterial that the alleged tortious act of the defendant was committed or had occurred outside the state of Indiana. For the purposes of the motion, it was sufficient that the infringing sale caused harm within this jurisdiction.

The concept of "doing business" was also a focus of discussion in the *Warner* case. The district court stated that, since the adoption of Trial Rule 4.4, it is no longer necessary for a foreign corporation to do business in Indiana before it becomes amenable to suit.⁶ However, under the federal rules, venue is properly laid in any district in which a corporation is doing business.⁷ The court found that, even though for the purposes of affording jurisdiction the defendant was not doing business in Indiana, nevertheless, for venue purposes a corporation found amenable to service of process in a district should also be held to be doing business in that district.

⁴See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁵366 F. Supp. 187 (S.D. Ind. 1973).

⁶*Byrd v. Whitestone Publications, Inc.*, 27 Ind. Dec. 619 (S.D. Ind. 1971).

⁷28 U.S.C. § 1391(c) (1970).

Thus, the court held that the fact that the defendant company relied upon the services of an independent contractor, while precluding jurisdiction under Trial Rule 4.4(A) (1), did not prevent a finding that the company was "doing business" within the meaning of the federal venue statute.

In *Podgorny v. Great Central Insurance Co.*,⁸ the Indiana Court of Appeals upheld the right to attack collaterally a judgment rendered in another state on the ground that the court lacked jurisdiction over the person. The plaintiff-appellee sought to enforce in Indiana a previous default judgment obtained in Illinois against the appellant, an Indiana resident. Both parties moved for summary judgment in the Indiana proceeding, the appellant contending that the Illinois decision was void for the reason that he was never served with process. In support of his motion for summary judgment, appellant filed an affidavit asserting that the first notice he received of the action was upon receipt of summons in the Indiana suit and that he had no personal knowledge of the proceedings until after entry of judgment in the Illinois suit. The Indiana trial court denied appellant's motion for summary judgment and granted the motion of plaintiff-appellee.

In reversing, the court of appeals held that summary judgment was improper since the motions for summary judgment and the documents filed in support thereof revealed the existence of a genuine issue as to whether the provisions of the Illinois rules for substituted service had been satisfied. The court noted that, if appellant's affidavit were taken as true and all doubts resolved in his favor, the presumption of validity attaching to judgments of sister states was insufficient to carry the case against appellant:

His lack of actual notice then supports an inference that the provisions for substituted service were not properly complied with, since the whole concept of substituted service constituting personal rather than constructive service, is that if the provisions for substituted service are met, the party is so reasonably likely to receive actual notice that the requirements of due process are fulfilled.⁹

Finally, two recent cases involving widely diverse circumstances dealt with the trial court's retention of jurisdiction over the case. In *Smith v. Indiana State Board of Health*,¹⁰ a suit was brought seeking an injunction to prevent a rock festival. The defendants filed a motion for a change of judge, which motion was granted. Later on the same day, the plaintiffs presented a petition for a temporary restraining order which the same judge also

⁸311 N.E.2d 640 (Ind. Ct. App. 1974).

⁹*Id.* at 648.

¹⁰303 N.E.2d 50 (Ind. Ct. App. 1973).

granted. The issue raised on appeal was whether the judge, who had previously granted a motion for change of judge, had the authority to grant the temporary restraining order.

The court of appeals held that jurisdiction of the case was retained by the judge for emergency matters, even though a change of judge had been granted. The court observed that if the law were otherwise it would contravene policy considerations as well as ruling precedent and would create a problematic situation wherein, for a certain period of time, no court would have jurisdiction to act. Hence, until a new judge qualified, jurisdiction remained in the judge granting the venue change to issue temporary restraining orders and, doubtless, other forms of relief necessitated by an emergency.¹¹

The case of *Farley v. Farley*¹² concerned the trial court's retention of jurisdiction in a divorce proceeding after the final decree of divorce had been rendered. The appeal attacked the judge's authority to enter an order for the husband to pay suit money, said order having been issued five months after the decree of divorce for the wife was entered. The husband contended that, because the duty of the husband to support his wife terminates upon entry of a final divorce decree, an order for suit money must be included in the divorce decree or be forever barred.

The court of appeals held that the post-facto granting of attorneys' fees and litigation expenses to the wife was proper under the circumstances of the case. Alternative theories for supporting the continuing jurisdiction of the trial court were proffered. First, although a line of cases supports the proposition that courts are without power to assess suit money after entry of a final divorce decree,¹³ an exception exists for obligations specified in the decree. The court found that the divorce decree could be construed as reserving the question of suit money. Alternatively, the assessment of suit money subsequent in time to the entry of the order severing the marital relationship was deemed proper on the basis of the rule of *Alderson v. Alderson*¹⁴ that the various aspects of a divorce decree are divisible. Thus, the granting of a divorce decree does not divest the court of jurisdiction to dispose of matters necessarily

¹¹See also *Gibson v. Miami Valley Milk Producers, Inc.*, 299 N.E.2d 631 (Ind. Ct. App. 1973), in which the court held that the filing of a Trial Rule 75 motion to transfer the case does not preclude all further action in the forum where the action is pending. In contrast, the court of appeals noted, the filing of a Trial Rule 76 motion for change of venue from judge or county requires that the original court grant the motion and take no further action in the matter.

¹²300 N.E.2d 375 (Ind. Ct. App. 1973).

¹³*E.g.*, *O'Connor v. O'Connor*, 253 Ind. 295, 253 N.E.2d 250 (1969).

¹⁴281 N.E.2d 82 (Ind. 1972).

incidental to the divorce proceeding. As a further reason for sustaining the ruling of the trial court, the court of appeals found that the appellant had effectively waived his right to assert lack of jurisdiction as a ground for appeal because his motion to correct errors failed to raise that issue with specificity. Although subject-matter jurisdiction may be challenged at any time, jurisdiction over the particular case, the court noted, must be objected to in a timely and specific fashion.

B. Scope of the Trial Rules

During the past term, attention was directed to the applicability of the Indiana Rules of Trial Procedure to administrative and criminal proceedings. Although two recent decisions¹⁵ reaffirmed that the Trial Rules do not pertain to proceedings before administrative agencies,¹⁶ the Indiana Supreme Court, in the case of *City of Mishawaka v. Stewart*,¹⁷ upheld the applicability of the Trial Rules to appeals taken from trial court reviews of administrative rulings. The Board of Public Works and Safety of the City of Mishawaka dismissed petitioner from the fire department following a hearing on charges of misconduct. On judicial review, the decision was reversed. The City then commenced the process of appeal from that decision by filing with the trial court a motion to correct errors. Following the overruling of the motion to correct errors by the trial court, the City perfected an appeal to the court of appeals where the holding below was reversed.¹⁸ In his petition to transfer to the supreme court, petitioner alleged that the City's appeal to the courts of appeals was faulty because the City failed to file a petition for rehearing as required by Indiana Code section 18-1-11-3¹⁹ as a prerequisite to perfecting such an appeal.

The supreme court upheld the decision of the court of appeals to the effect that the Indiana Rules of Trial Procedure have superseded the statutory provisions requiring a petition for rehearing. Thus, a motion to correct errors, rather than a petition for rehearing, is the proper method of perfecting an appeal from a trial court's review of board action.

¹⁵*King v. City of Gary*, 296 N.E.2d 429 (Ind. 1973) (Trial Rule 16 not applicable to hearing before Police Civil Service Commission); *Smith v. Review Bd. of Ind. Emp. Sec. Div.*, 306 N.E.2d 140 (Ind. Ct. App. 1974) (Trial Rule 5(E)(2) not applicable to proceeding before Review Board of Indiana Employment Security Division).

¹⁶*See Clary v. National Friction Prods., Inc.*, 290 N.E.2d 53 (Ind. 1972).

¹⁷310 N.E.2d 65 (Ind. 1974).

¹⁸*City of Mishawaka v. Stewart*, 291 N.E.2d 900 (Ind. Ct. App. 1973).

¹⁹IND. CODE § 18-1-11-3 (IND. ANN. STAT. § 48-6105, Burns Supp. 1974).

In the case of *Julkes v. State*,²⁰ the issue was whether Trial Rule 53.1 would be operative in regard to a petition for habeas corpus and would thereby cause a trial judge to be relieved after thirty days for failure to rule on the writ within that time. The supreme court held that Trial Rule 53.1 is inapplicable to this situation. A contrary holding, it was suggested, would in effect be a grant of authority to the trial judge to delay as long as thirty days before granting relief, thereby undermining the concept of speedy relief fundamental to the habeas corpus remedy. The court declared that the proper procedure to follow, when a writ of habeas corpus filed in the trial court is not acted upon promptly, is to petition for a writ of mandate from the supreme court.

Two recent cases recognized the inapplicability of certain trial rules to criminal proceedings.²¹ In *Neeley v. State*,²² the court of appeals held that Trial Rule 52(A), requiring the trial court to make findings of fact and conclusions of law at the request of a party, does not pertain to criminal trials. By way of explication of this holding, the court of appeals noted that, whereas the basis of the trial court's decision in a civil matter may require clarification because of complex issues and vague common law precedents, the elements of a crime which must be satisfied at trial are set forth by statute. Thus, findings of fact and conclusions of law are unnecessary and cannot be requested by a criminal defendant.

In *State ex rel. Rodriguez v. Grant Circuit Court*,²³ the supreme court held that Trial Rule 76 is not the appropriate means for requesting a change of venue from a judge in a criminal case. According to the decision, Criminal Rule 12 constitutes the exclusive provision governing such a procedure in criminal matters.²⁴ On the other hand, in the case of *Crockett v. Vigo County School Corp.*,²⁵ the supreme court reemphasized that the provisions of Trial Rule 79 for the appointment of a special judge pertain to all proceedings, including criminal. This assertion was made in conjunction with a discussion of Trial Rule 79 as it relates to Indiana Code section 34-4-17-4(b) and (c).²⁶ The court held that the statutory provisions

²⁰295 N.E.2d 619 (Ind. 1973).

²¹See IND. CODE § 35-1-49-1 (IND. ANN. STAT. § 9-2407, Burns Supp. 1973), which provides that "[i]n all criminal cases where no special provision has been made in this act, the rules of pleading and practice in civil actions shall govern, so far as applicable."

²²297 N.E.2d 847 (Ind. Ct. App. 1973), *aff'd*, 305 N.E.2d 434 (Ind. 1974).

²³309 N.E.2d 145 (Ind. 1974).

²⁴IND. R. CRIM. P. 12.

²⁵295 N.E.2d 621 (Ind. 1973).

²⁶IND. CODE § 34-4-17-4(b) & (c) (Burns 1973). These provisions, which pertain to public lawsuits, provide in part:

(b) Change of Venue. A change of venue from the judge may be

were abrogated by Trial Rule 79 which provides the exclusive manner for the selection of special judges in all causes, whether civil, statutory, or criminal, and in any court except justice of the peace and magistrate courts.

C. *Pleadings and Pretrial Motions*

Two recent cases concerned the adequacy of the complaint in actions involving claims of fraud. In the case of *Physicians Mutual Insurance Co. v. Savage*,²⁷ the court of appeals was presented with an argument that the trial court should have granted a new trial on the ground of unavoidable surprise. The defendant company contended that it was unaware that a claim of fraud had been raised against it because no allegation of fraud appeared in the complaint. Nevertheless, during the course of the trial, reference was made to fraudulent conduct on the part of the defendant and the question of exemplary damages was raised. In addition, the trial brief of plaintiff contained a discussion of fraud and exemplary damages.

The defendant insurance company relied upon Trial Rule 9(B) requiring fraud or mistake to be averred specifically. The court of appeals stated that Trial Rule 9(B) should be read in conjunction with Trial Rule 8, which requires only a "short and plain statement" of the claim. The court held that not only did Trial Rule 8 qualify Trial Rule 9(B) but that, moreover, the pleader was not required to state in his complaint the theory upon which his claim was based.²⁸ Finally, the court noted that the defendant failed to protect itself from alleged surprise by moving for a continuance under Trial Rule 15(B).

In the case of *Sundstrand Corp. v. Standard Kollsman Industries, Inc.*,²⁹ the United States Court of Appeals for the Seventh Circuit considered whether a plaintiff should be limited at trial to proof of only the specific acts of fraud alleged in the complaint. The issue arose in the context of a securities suit in which there was a general allegation of wrongdoing in violation of section 78j of the Securities Exchange Act of 1934³⁰ and of the Rules and Regulations of the Securities and Exchange Commission. At trial, the district court ruled that the general statement of wrongdoing contained in a particular paragraph of the complaint was limited by

had but no change from the county will be permitted. . . .

(c) Special Judge. The rules regarding the selection of a special judge in civil cases shall not apply

²⁷296 N.E.2d 165 (Ind. Ct. App. 1973).

²⁸See *State v. Rankin*, 294 N.E.2d 604 (Ind. 1973).

²⁹488 F.2d 807 (7th Cir. 1973).

³⁰15 U.S.C. § 78j (1970).

the specific claims of fraud made elsewhere in the complaint; thus, it refused to admit evidence in proof of fraud beyond the specific acts alleged. The court of appeals held that this ruling was erroneous.

The court of appeals stated that pleading is not a procedural game of skill and that, as has often been propounded, the important function of pleading is to inform the opposing parties of the basis of the claim. Further, the court held that, in deciding whether a complaint has fairly notified a defendant of the matters sought to be litigated, *it was entirely proper to look beyond the pleadings to the pretrial conduct and communication of the parties*. In addition, the fruits of discovery may provide important information relevant to discerning the breadth of the complaint. Hence, according to the court of appeals, the trial court erred in restricting the more general allegation of the complaint to the specific acts enumerated elsewhere in the complaint.

The *Sundstrand* opinion also involved another appeal based on the same stock transaction. In the context of this appeal, the court had occasion to consider the relationship of the burden of proof to the requirement under Federal Rule of Civil Procedure 8(c) that the defendant affirmatively plead certain defenses in his answer.³¹ Halfway through the trial, the counterclaim defendant asserted that equitable relief was not available on the counterclaim because there existed an adequate remedy at law. The trial court thereupon dismissed the counterclaim and, upon appeal, the counterclaimant argued that the counterclaim defendant was barred from raising the question of an adequate remedy at law because of its failure to plead the point affirmatively in its answer.

The court of appeals held that, since under controlling Illinois law the burden of proving an "inadequate remedy at law" was upon the plaintiff, the defendant was not required to plead an "adequate remedy at law" as an affirmative defense. The court noted that, among federal courts, there is a split of opinion on this question and that, in some courts, the defendant is required to plead as an affirmative defense any issue specifically indicated in rule 8(c) regardless of who has the burden of proof under state law. According to the Seventh Circuit Court of Appeals, however, "in our view the better rule is that a defendant need plead affirmatively only those defenses upon which he carries the burden of proof."³²

³¹The provisions of Indiana Rule of Trial Procedure 8(C) largely parallel those of the federal rule.

³²488 F.2d at 813. In addition, the Supreme Court of Indiana recently recognized that the defense of sovereign or governmental immunity must be raised as a Trial Rule 8(C) affirmative defense. *Miller v. Griesel*, 308 N.E.2d 701 (Ind. 1974).

The effect of a failure to reply was reiterated³³ by the Indiana Court of Appeals in the case of *State v. Hladik*.³⁴ The question of what pleadings require a reply arose in the context of an eminent domain action. Eight months before trial the defendants filed an "Amended Supplemental Pleading" in which they characterized themselves as "third party plaintiffs" and in which they complained that the actions of the "third party defendants" in constructing a sewer and high tension electrical line constituted an additional taking for the purposes of assessing damages. On motion of the State, the third party defendants were struck from the action. The State failed to respond to the allegations of the supplemental pleading, and the trial court ordered that, in the absence of amendment or reply, the State was deemed defaulted as to the issues set forth in the pleading. On appeal, the ruling of the trial court was upheld. The court of appeals declared that, although the supplemental pleading was not a "denominated counterclaim, which is the only counterclaim to which a literal reading of Trial Rule 7(A) requires a reply,"³⁵ nonetheless, the State was obligated to reply pursuant to the order of the trial court. Its failure to reply, the court held, constituted an admission of the veracity of the allegations made in the supplemental pleading.

A number of recent Indiana cases have interpreted and refined the law relating to amendments of complaints. In *Sekerez v. Gary Redevelopment Commission*,³⁶ the plaintiff filed an amended complaint after an answer was filed by the defendant. The defendant moved to strike the plaintiff's amended complaint on the ground that it was not filed in compliance with Trial Rule 15(A). In discussing the question on appeal, the appellate court stated that, pursuant to Trial Rule 15(A), an amended complaint may be filed following an answer only with leave of the court or with written consent of the adverse party. An amended complaint may be filed as a matter of right prior to the answer; but, the court held, if the complaint is filed after that time, and if neither condition is satisfied, the amended complaint is properly struck.

Interpretation of Trial Rule 15(C), concerning the relation back of amendments, was rendered in the case of *Simmons v. Fenton*.³⁷ The complaint, in an action sounding in tort, was filed on the

³³See Harvey, *Civil Procedure and Jurisdiction*, 1973 *Survey of Indiana Law*, 7 IND. L. REV. 24, 34 (1973), for a discussion of *Commercial Credit Corp. v. Miller*, 280 N.E.2d 856 (Ind. Ct. App. 1972), wherein the problem was also discussed.

³⁴302 N.E.2d 544 (Ind. Ct. App. 1973).

³⁵*Id.* at 548.

³⁶301 N.E.2d 372 (Ind. Ct. App. 1973).

³⁷480 F.2d 133 (7th Cir. 1973).

last day of the two-year statute of limitations period. The defendant named in the complaint was, in fact, the daughter of the woman who was driving the car which caused the alleged injury. The plaintiffs, however, first became aware of this error, according to their motion to "correct the misnomer by substituting a proper name," when the daughter filed a motion for summary judgment approximately fourteen months after the statute of limitations had run. The question was whether plaintiffs' motion to substitute the proper name should be granted and whether the original complaint, as amended, would relate back to the time of filing.

The mother argued that the statute of limitations had run and that, pursuant to Trial Rule 15(C), there was no relation back of the complaint as amended. The motion to correct the misnomer was denied by the trial court, and the Seventh Circuit affirmed, holding that under Trial Rule 15(C) the defendant must receive notice of the institution of the action within the period of time provided by law for commencing the action. Such obviously was not the case here.

The import of this holding is that a motion to correct a misnomer can be granted only when the defendant is a proper defendant and already in court and, thus, when the only effect of the motion is to correct the name under which the defendant is sued. However, if a new defendant is to be substituted or added by amendment, then the substitution or amendment must occur prior to the time set by the statute of limitations. A substitution occurring thereafter cannot be saved by the doctrine of relation back. In sum, rule 15(C) is keyed to notice, whereas the commencement of an action and the tolling of the statute of limitations are keyed to the filing of a complaint.³⁸

Finally, in the case of *Ayr-Way Stores, Inc. v. Chitwood*,³⁹ the Indiana Supreme Court was presented with the question of whether pleadings could be amended to conform to the evidence presented at trial. The case arose out of a lawnmower accident, and the trial court granted the plaintiff's motion to amend the complaint to conform to the evidence adduced during the trial. The court of appeals reversed, holding that the defendants had not impliedly litigated the added issues of strict liability and implied warranty and, more-

³⁸The same result was reached by the Indiana Court of Appeals in a recent case involving similar circumstances. See *Gibson v. Miami Valley Milk Producers, Inc.*, 299 N.E.2d 631 (Ind. Ct. App. 1973). In *Gibson*, the court stated: "Under the present T.R. 15 and the prior procedure this doctrine [relation back] did not permit the addition of an entirely new party or the stating of an entirely new claim after the statute of limitations has run." *Id.* at 638.

³⁹300 N.E.2d 335 (Ind. 1973).

over, that a failure to grant a continuance was prejudicial to the defense.⁴⁰

In the supreme court, the trial court's determination was upheld. The supreme court held that clearly the amendments should have been permitted because the proof at trial sustained either a theory of strict liability or of breach of implied warranty and because the defendants, by failing to object at trial when the evidence was presented, consented to the proof offered. Therefore, they waived the charge of prejudice stemming from the granting of the amendments. In addition, the court held that, when a trial has ended without objection or qualification to the course which it took, the evidence presented is controlling. At that point, neither pleadings, pretrial orders, or theories postulated by either party should operate to frustrate the trier of fact in finding the facts which the preponderance of the evidence permits.

Concerning the question of whether a continuance should have been granted to the defendants, the court noted that the defendants stated only that they would be prejudiced by the amendments. According to the court, the moving party for a continuance must show that allowing the amendments would be prejudicial to his rights in maintaining his action or defense. In this case, the defendants, as the moving parties for continuance, failed to establish their affirmative burden in demonstrating this particular type of prejudice. In conclusion, the court declared that whether a continuance should be granted when pleadings are amended is a matter of discretion for the trial court and, absent a showing of clear and prejudicial abuse of that discretion, the trial court's ruling will not be disturbed.⁴¹

Pretrial motions relating to change of venue and change of judge were the subject of judicial consideration in a few recent cases. In *State ex rel. Yockey v. Superior Court*,⁴² the supreme court gave a definitive interpretation of Trial Rule 76, which provides in part that an application for a change of venue or a change of judge shall be filed not later than ten days after the issues are first closed on the merits. Specifically, the question presented was *when*, for the purposes of Trial Rule 76(2), the issues shall be deemed first closed on the merits in a situation wherein new issues are developed subsequent to the pleadings but before trial.

The supreme court held that, for the purposes of Trial Rule 76(2), issues shall be deemed first closed on the merits upon the filing of the defendant's answer. Filing of the answer, the court stated, shall initiate the ten-day period within which a change of

⁴⁰*Ayr-Way Stores, Inc. v. Chitwood*, 292 N.E.2d 298 (Ind. Ct. App. 1973).

⁴¹*Accord*, *Hunter v. Milhous*, 305 N.E.2d 448 (Ind. Ct. App. 1973).

⁴²307 N.E.2d 70 (Ind. 1974).

venue motion must be made. Furthermore, the court declared, for the purposes of Trial Rule 76(2), it is immaterial that an amended or supplemental answer may follow. Likewise, it is immaterial that a counterclaim is filed to which a reply is required under Trial Rule 7(A). Only the *original* answer determines when the issues between adverse parties are first closed.⁴³

In the case of *State ex rel. Sedam v. Ripley Circuit Court*,⁴⁴ the supreme court recognized an automatic right to a change of judge when a circuit court judge files an information seeking the removal of a member of the Board of Public Welfare. The court justified this holding on the ground that a removal proceeding is adversary in nature. Thus the functioning of the judge as both prosecutor and trier of fact cannot be countenanced. Both Trial Rule 79(11) and Trial Rule 76(1), the court noted, compel a change of venue in this situation.

Motions to dismiss under the various Indiana Rules of Trial Procedure were the subject of considerable judicial comment during the past term. In the case of *Salem Bank & Trust Co. v. Whitcomb*,⁴⁵ the supreme court considered the operation of Trial Rule 12(B)(8) in converting a motion to dismiss into a motion for summary judgment. In the trial court, interrogatories had been filed prior to argument and ruling on the motion to dismiss. The trial court sustained the motion to dismiss but failed to follow the procedures for summary judgment set out in Trial Rule 56. The court of appeals held that the motion to dismiss was automatically converted, by the presence of extraneous matters, into a motion for summary judgment under Trial Rule 12(B)(8) and cited the trial court for error in failing to follow the summary judgment procedure.⁴⁶ The supreme court affirmed, holding that the mere filing

⁴³*Accord*, *State ex rel. Katz v. Superior Court*, 308 N.E.2d 694 (Ind. 1974). A related problem was raised in *Hunter v. Milhous*, 305 N.E.2d 448 (Ind. Ct. App. 1973). In *Hunter*, the question of when the issues are deemed first closed for the purposes of Trial Rule 76(2) arose in the context of a multi-defendant suit in which a number of answers were filed. The court of appeals noted that the question of whether the first answer or the last answer filed acts to close the issues on the merits "seems to be a beclouded point in Indiana law." *Id.* at 453. The question was left unresolved by the court, since the denial of defendant's motion for change of venue was upheld on the grounds that under Trial Rule 76(7), the defendant had waived a change of venue by failing to object at the time the case was set for trial. Discretionary relief under Trial Rule 76(8) was similarly rejected for failure to show good cause. According to the court, local prejudice does not establish good cause in an action to be tried without a jury.

⁴⁴301 N.E.2d 185 (Ind. 1973).

⁴⁵308 N.E.2d 707 (Ind. 1974).

⁴⁶*Salem Bank & Trust Co. v. Whitcomb*, 298 N.E.2d 537 (Ind. Ct. App. 1973).

of the interrogatories with the court, whether or not specifically called to the court's attention by the parties, sufficed to convert the motion to dismiss into a motion for summary judgment.

In the case of *Sundstrand Corp. v. Standard Kollsman Industries, Inc.*,⁴⁷ the United States Court of Appeals for the Seventh Circuit found inappropriate the dismissal with prejudice of a counterclaim seeking specific performance. The trial court dismissed the counterclaim for the reason that equitable relief was not appropriate since the counterclaimant had an adequate remedy at law. The question then arose as to whether it was proper to dismiss the case rather than to award damages to the counterclaimant in light of rule 54(c) which states, in essence, that the final judgment shall grant the relief to which the party is entitled even if the party has not demanded such relief in his pleadings.

The court of appeals held that the dismissal with prejudice, in barring a subsequent suit for damages, contravened rule 54(c) and, moreover, thwarted pursuit of the adequate legal remedy given as the reason for dismissing the equitable claim. Hence, the court overruled the dismissal and remanded the case for a hearing on the damages question.

Lack of standing constituted the ground for dismissal in a number of recent court decisions. In the case of *City of Mishawaka v. Mahoney*,⁴⁸ the principal issue presented on appeal was whether the City, its mayor, its common council and the city clerk could maintain an action for declaratory judgment in order to determine the validity of a city ordinance which regulated the distribution of pornographic materials in the community. The City contended that the prospect of liability for false arrest for enforcing the ordinance if invalid constituted an interest within the purview of the Uniform Declaratory Judgment Act⁴⁹ which was sufficient to warrant declaratory relief. The court of appeals upheld the dismissal by the trial court on the ground that the City lacked standing to maintain this action under the Act. Noting the incongruity inherent in permitting a municipality, which has enacted an ordinance, to implore the court to rule upon its validity, the court of appeals held that

⁴⁷488 F.2d 807 (7th Cir. 1973). See text accompanying note 32 *supra*.

⁴⁸297 N.E.2d 858 (Ind. Ct. App. 1973).

⁴⁹IND. CODE § 34-4-10-2 (Burns 1973). This provision is as follows: Who may have determination and obtain declaration.—Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question or construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

the City and its officials had shown no right, status, or interest which was adversely affected by enforcement of the ordinance in question.

Similarly, a motion to dismiss was upheld against a municipality for lack of standing to challenge an action of the State Tax Board in the case of *City of Indianapolis v. Indiana State Board of Tax Commissioners*.⁵⁰ The City had intervened as an additional party-plaintiff in an action to enjoin the State Tax Board from making further increases in the 1971 county budgets and in the 1970 levies and rates for municipal corporations within Marion County. Upon judgment entered against the plaintiffs, the City alone prosecuted the appeal. The appellate court held that the City of Indianapolis, as a nontaxpaying municipal corporation, was unable to show any injury to a legally protected interest through the Tax Board's action. Furthermore, the City-County Council, on whose behalf the City appeared, lacked a monetary interest in the budgets or levies of other governmental units within the county. Thus, the appeal was properly dismissed for lack of standing.⁵¹

In *Ruckman v. Pinecrest Marina, Inc.*,⁵² the district court, in a wrongful death action, granted a motion to dismiss under rule 12 of the Federal Rules of Civil Procedure. The suit was brought by the administrators of the estates of two unemancipated minors who were killed as a result of the alleged acts of the defendant. Holding that Indiana law was controlling, the court dismissed with leave to amend for the reason that Indiana law requires that the father, not the personal representative, bring a wrongful death action.⁵³ According to the court, the personal representative of an estate of a

⁵⁰308 N.E.2d 868 (Ind. 1974).

⁵¹The question of whether the City had standing as an original plaintiff was not reached by the court. However, the supreme court criticized the court of appeals ruling which had dismissed the appeal on the grounds of mootness. *City of Indianapolis v. Indiana State Bd. of Tax Comm'rs*, 294 N.E.2d 136 (Ind. Ct. App. 1973). The supreme court noted that this ruling was improper because every taxpayer challenge to the tax-levying process arrives in the appellate courts after taxes have "presumably been paid." 308 N.E.2d at 871. Thus, the effect of holding the appeal "moot" would be to render nugatory the right of aggrieved taxpayers to challenge the actions of the State Tax Board. *Id.*

For recent cases holding that a municipal agency lacks standing as an aggrieved party to seek review of a decision of one of its zoning boards, see *Metropolitan Dev. Comm'n v. Newlon*, 297 N.E.2d 483 (Ind. Ct. App. 1973), and *Metropolitan Dev. Comm'n v. Losche*, 295 N.E.2d 836 (Ind. Ct. App. 1973). Both decisions relied upon the earlier case of *Metropolitan Dev. Comm'n v. Cullison*, 277 N.E.2d 905 (Ind. Ct. App. 1972).

⁵²367 F. Supp. 25 (N.D. Ind. 1973).

⁵³See IND. CODE § 34-1-1-8 (Burns 1973).

minor can sue for the death of the child only if the child's parents are dead or if the child has been emancipated.⁵⁴

A motion to dismiss under Trial Rule 12(B) (7) for failure to join an indispensable party was the subject of consideration in the case of *County Department of Public Welfare v. Morrow*.⁵⁵ The action was brought against the county board to prevent a man named Kelley, who had been appointed director of the board, from assuming that position. Kelley was not joined as a party defendant. Following the court's issuance of a temporary restraining order, the county board moved to dismiss on the ground of a failure to join an indispensable party. The court of appeals held that Kelley was an indispensable party in that the decree expressly prevented him from ever assuming the duties of director and thereby restrained his employment. According to the court, because Kelley's rights were adjudicated in the action, his presence as a party defendant was necessary.

The grounds for dismissal under Trial Rule 41(E) received interpretation in the case of *State v. McClaine*.⁵⁶ Trial Rule 41(E) provides, generally, that whenever there has been a failure to comply with the trial rules and no action has been taken in a civil case for a period of sixty days, the court, on its own motion or on the motion of a party, shall order a hearing for the purpose of dismissing the case. In the *McClaine* case, there were two lengthy periods of time during which the State, as plaintiff, took no affirmative steps in the prosecution of its case. The first time period ran from 1958 to 1967; the second time period extended from 1968 to February 17, 1971, on which day the State filed a request for trial. On February 26, 1971, the defendants moved to dismiss under Trial Rule 41(E). The supreme court held that the defendants' motion was not timely made. According to the court, the motion must be filed *after* the sixty-day period has expired but *before* the plaintiff resumes prosecution of the case. Since the defendants here moved to dismiss after the plaintiff had filed its request for trial, they failed to satisfy the requirements of Trial Rule 41(E), as construed in this opinion.

The other aspect of Trial Rule 41(E), dismissal for failure to comply with the trial rules, received interpretation in the case of *Webb v. City of Bloomington*.⁵⁷ The action was in the form of a remonstrance against an ordinance adopted by the City which

⁵⁴367 F. Supp. at 26-27. The court cited for this proposition the cases of *Berry v. Louisville, E. & St. L.R.R.*, 128 Ind. 484, 28 N.E. 182 (1891), and *Pere Marquette R.R. v. Chadwick*, 65 Ind. App. 95, 115 N.E. 678 (1917).

⁵⁵301 N.E.2d 787 (Ind. Ct. App. 1973).

⁵⁶300 N.E.2d 342 (Ind. 1973).

⁵⁷306 N.E.2d 382 (Ind. Ct. App. 1974).

would have effected an annexation of certain property. The litigation was terminated when the City's motion to dismiss pursuant to Trial Rule 41 was granted by the trial judge after the ordinance had been repealed.

One question raised on appeal was whether it was within the competency of the trial court to dismiss the action pursuant to Trial Rule 41 after the ordinance was withdrawn. The argument advanced was that only the plaintiff can move for dismissal under the rule. The court of appeals held that a dismissal pursuant to Trial Rule 41(E) for failure to comply with "these rules" would embrace Trial Rule 8 as well as Trial Rule 12, and that, therefore, the motion was properly asserted by the defendant.⁵⁸ The reasoning underlying the court's holding was that the absence of a litigable claim, an integral part of every action, means there is no claim for relief stated under Trial Rule 8. Because there was no claim for relief stated pursuant to Trial Rule 8, there was a failure to follow the rules. Hence, the dismissal under Trial Rule 41(E) was proper.

A further question raised on appeal in the case concerned the propriety of the trial court's denial of the remonstrator's motion for summary judgment. The court of appeals held that the motion for summary judgment pursuant to Trial Rule 56 was not appropriate from a legal standpoint given the absence of a justiciable issue.

Further exposition of the requirements for obtaining a summary judgment pursuant to Trial Rule 56 was provided in the case of *Renn v. Davidson's Southport Lumber Co.*⁵⁹ In that case, the motion for summary judgment was filed by the counterclaimant, a seller of building materials furnished for the construction of a house. The court of appeals, in reversing the trial court which had granted the motion, observed that the affidavit supporting the motion did not show affirmatively that it was made on personal knowledge or that the affiant was competent to testify regarding the matters stated therein. Furthermore, the affidavit set forth no facts which would support any of the conclusory statements made and, in particular, it failed to set forth facts which would establish an agency relationship between the homeowners and the contractor who purchased the building materials.

The court of appeals asserted that for the seller to be entitled to summary judgment he must make a prima facie case. A determination of whether a prima facie showing has been made is based upon affidavits offered, pursuant to Trial Rule 56(E), concerning matters placed in issue by the pleadings. Thus, according to the court, to be entitled to that initial determination the moving party

⁵⁸*Id.* at 386.

⁵⁹300 N.E.2d 682 (Ind. Ct. App. 1973).

must comply with the affidavit requirements found in Trial Rule 56(E). The court of appeals held that, absent compliance with that rule by the moving party, a summary judgment in his favor is incorrect, even if the opposing party fails to respond to the motion.⁶⁰

Finally, in the case of *State v. Smith*,⁶¹ the relationship of Trial Rule 63 to a summary judgment proceeding was considered by the supreme court.⁶² The case, an eminent domain proceeding, was originally docketed to a certain judge who presided over all pretrial motions and hearings in the case, including a motion for summary judgment. Summary judgment was granted to the defendant and the State then filed a motion to set aside the summary judgment. In the interim between the judgment and the motion, however, the original judge had been succeeded by another judge. The new sitting judge transferred the hearing on the motion to set aside to his predecessor who was, at that time, a private attorney. He overruled the State's objection to the transfer and the state appealed. The supreme court held that, pursuant to Trial Rule 63, it was entirely proper to transfer the cause to the person who once sat on the case. A summary judgment hearing, the court asserted, is part of a "trial of a cause" as those words are used in the context of Trial Rule 63.

D. Pretrial Procedures and Discovery

Further refinement was given this year to the motion in limine,⁶³ a procedure for obtaining a protective order to prevent the introduction of certain evidence at trial. In the case of *Baldwin v. Inter City Contractors Service, Inc.*,⁶⁴ the court of appeals discussed the use of this motion in the context of a court trial. The motion, which sought to exclude expert testimony as irrelevant, was granted by the trial court. The court of appeals stated that the trial court's ruling on this motion was improper. According to the appellate court, the motion in limine is inappropriate in a trial to the court; its use is limited to trials by jury. Also, the court held that the motion has a restricted purpose in that it is designed to exclude

⁶⁰*Accord*, *Podgorny v. Great Cent. Ins. Co.*, 311 N.E.2d 640 (Ind. Ct. App. 1974); *Newell v. Standard Land Corp.*, 297 N.E.2d 842 (Ind. Ct. App. 1973).

⁶¹297 N.E.2d 809 (Ind. 1973).

⁶²IND. R. TR. P. 63(A) provides:

The judge who presides at the trial of a cause or a hearing at which evidence is received shall, if available, hear motions and make all decisions and rulings required to be made by the court relating to the evidence and the conduct of the trial or hearing after the trial or hearing is concluded.

⁶³See Harvey, *Civil Procedure and Jurisdiction*, 1973 *Survey of Indiana Law*, 7 IND. L. REV. 24, 38 (1973).

⁶⁴297 N.E.2d 831 (Ind. Ct. App. 1973).

only prejudicial matter. Its scope cannot be extended to exclude items of evidence which may merely be irrelevant. Thus, unless prejudice to the cause is demonstrated, the motion in limine must be denied.

Notable in the area of discovery procedures is the case of *Richmond Gas Corp. v. Reeves*.⁶⁵ One of the issues raised on appeal in this case was whether the trial court erred in permitting a party to read into evidence a portion of a deposition which contained an expert's opinion concerning the cause of an explosion. Specifically, an argument raised on appeal was that the expert's testimony was inadmissible because it was not given in response to a proper hypothetical question. The court of appeals referred to Trial Rule 32(D) (3) (b), concerning errors and irregularities occurring at an oral examination upon deposition. This rule specifies that any objection to the form of questions or answers is waived unless it is seasonably made at the taking of the deposition. Noting that here no objection was made when the deposition was taken, the court held that, therefore, the opponent of the evidence waived any error arising from the failure to question the expert witness in the proper hypothetical form. Thus, on this point, the court concluded that error was not committed by the trial court in allowing the deposition to be read into evidence.

E. Trial and Judgment

In the case of *Robinson v. State*,⁶⁶ the supreme court issued forceful guidelines concerning the use of attorneys' questions on voir dire examination. The court reproofed the long-standing practice of lawyers in Indiana to try their cases during the voir dire examination. Such practice, the court observed, fosters bias and prejudice advantageous to the litigant instead of avoiding bias and prejudice in the selection of the jury. To eliminate this evil, the supreme court suggested that proper voir dire examination

can be best accomplished by the trial judge's assumption of a more active role in the voir dire proceedings and by exercising, rather than abdicating, his broad discretionary power to restrict interrogation to that which is pertinent and proper for testing the capacity and competence of jurors.⁶⁷

Thus, the supreme court admonished judges to supervise more closely the conduct of attorneys during the voir dire examination.

⁶⁵302 N.E.2d 795 (Ind. Ct. App. 1973).

⁶⁶297 N.E.2d 409 (Ind. 1973).

⁶⁷*Id.* at 412.

A number of recent cases enunciated the standard to be applied by the trial court in considering a motion for a judgment on the evidence (directed verdict) under Trial Rule 50. In the case of *Johnson v. Mills*,⁶⁸ the court of appeals stated that a directed verdict on a specific issue depends upon the total absence of evidence on an essential element of the plaintiff's case. The evidence on the issue, the court noted, must be without conflict and susceptible of but one ruling in favor of the moving party. The principle was reaffirmed in the recent cases of *Smith v. Chesapeake & Ohio Railroad*,⁶⁹ *Miller v. Griesel*,⁷⁰ *Lake Mortgage Co. v. Federal National Mortgage Association*,⁷¹ and *Powell v. Powell*.⁷² In the latter case, the court of appeals held that a directed verdict is proper only in cases tried before a jury or an advisory jury.⁷³ In actions tried by the court without a jury, the court observed, a motion for involuntary dismissal under Trial Rule 41(B) may be the appropriate way to raise the same question as would be presented by a motion for judgment on the evidence in a jury trial.

Another aspect of Trial Rule 50 was considered in the case of *Hess v. Bob Phillips West Side Ford, Inc.*⁷⁴ The question raised on review was whether a trial judge may, pursuant to its own motion

⁶⁸301 N.E.2d 205 (Ind. Ct. App. 1973).

⁶⁹311 N.E.2d 462 (Ind. Ct. App. 1974). The trial court in the *Smith* case, at the close of all the evidence, granted a motion for judgment on the evidence and directed the jury to return a verdict for the defendant. The court of appeals, in reversing, cited with approval the case of *Swearngin v. Sears Roebuck & Co.*, 376 F.2d 637 (10th Cir. 1967). There, and in the discussion in *Smith*, the point was made that, in determining whether to grant or deny a Trial Rule 50 motion, the entire body of evidence must be examined, in addition to all inferences favorable to the party against whom the motion is made. In short, the evidentiary review which the trial court conducts is not limited to a review of only the evidence of the non-moving party, but must encompass all the evidence which is before the court when the motion is made. The same standard, the court stated, would apply when the motion was made in a post-verdict setting.

⁷⁰297 N.E.2d 463 (Ind. Ct. App. 1973), *aff'd*, 308 N.E.2d 701 (Ind. 1974). In this case, the standards were held applicable to a motion granted at the close of plaintiff's case.

⁷¹308 N.E.2d 739 (Ind. Ct. App. 1974). In this case, the motion for judgment on the evidence was granted at the close of all the evidence. Accordingly, the jury verdict for cross-plaintiffs was set aside. The court of appeals, on review, noted that the judgment on the evidence would have been improper if there were any probative evidence or reasonable inferences to be drawn from the evidence or if, in considering the evidence, reasonable men might differ in their conclusions.

⁷²310 N.E.2d 898 (Ind. Ct. App. 1974).

⁷³See *Hoosier Ins. Co. v. Ogle*, 276 N.E.2d 876 (Ind. Ct. App. 1971); *Clark v. Melody Bar, Inc.*, 149 Ind. App. 245, 271 N.E.2d 481 (1971).

⁷⁴304 N.E.2d 814 (Ind. Ct. App. 1973).

under Trial Rule 50, set aside a judgment entered on a jury verdict and, prior to hearing argument and ruling on a motion to correct errors, enter judgment for the other party. In this case, the trial to a jury resulted in a verdict for the plaintiff; judgment was entered on the same day that the verdict was returned. The defendant filed a motion to correct errors and, on the day the parties appeared for a hearing on that motion, the trial court on its own motion set aside the judgment pursuant to Trial Rule 50(A)(6) and entered a judgment notwithstanding the verdict. On appeal, the plaintiff contended that the court could act to set aside a judgment only in response to a motion by one of the parties. The court of appeals held that the trial court had the authority under Trial Rule 50 to act sua sponte to set aside a judgment and enter a new judgment prior to ruling upon the motion to correct errors. In effect, then, a trial court may enter judgment on the evidence on its own motion at any time prior to ruling upon a motion to correct errors.

The question of whether attorneys' fees and other fees can appropriately be included in costs awarded upon judgment received attention in recent judicial opinions. In the case of *State v. Holder*,⁷⁵ the State's appeals in eminent domain proceedings raised the questions of whether fees for attorneys, professional witnesses, and trial preparation could be awarded to the appellee land-owner. The trial court granted the fees. The supreme court reversed, holding that the principle had long been established in Indiana law that the word "costs" does not encompass attorneys' fees⁷⁶ and that, therefore, the power granted to the judge to award "costs" under the Eminent Domain Act⁷⁷ does not include authority to order the payment of attorneys' fees.

The State further argued that money awarded to the appellee for trial preparation and professional witness fees should not be sustained and that, again, such expenses were not encompassed in the term "costs." The supreme court agreed. The court stated that it did not believe that the word "costs" was intended to cover every conceivable expense incurred by a landowner in that type of action. Citing cases from other jurisdictions as authority,⁷⁸ the supreme court held that the expenses of retaining an expert witness to testify and other trial preparation expenses, such as mailing costs, travel, telephone, and photographic fees, are not contemplated

⁷⁵295 N.E.2d 799 (Ind. 1973) (Prentice, J., concurring; Arterburn, C.J. & Hunter, J., dissenting).

⁷⁶See, e.g., *Hutts v. Martin*, 134 Ind. 587, 33 N.E. 676 (1893).

⁷⁷IND. CODE § 32-11-1-10 (Burns 1973).

⁷⁸*Frustuck v. Fairfax*, 230 Cal. App. 2d 412, 41 Cal. Rptr. 56 (1964); *Manchester Housing Authority v. Belcourt*, 285 A.2d 364 (N.H. 1971); *State v. Mandes*, 119 N.J. Super. 59, 290 A.2d 154 (1972).

in the use of the term "costs." Accordingly, that part of the trial court's order which directed the State to pay the appellee's fees for attorneys, trial preparation, and expert witnesses was vacated on appeal.

In a concurring opinion, Justice Prentice expressed his belief that fees for trial preparation and professional services were similarly improper under Trial Rule 41(A)(2), which authorizes a plaintiff to withdraw his action under voluntary dismissal.⁷⁹ Justice Prentice opined that the "terms and conditions" established by the court for voluntary dismissal, which terms and conditions ordinarily include the costs of the action, would not encompass attorneys' fees and the expenses of trial preparation.⁸⁰ A lengthy dissenting opinion by Justice Arterburn expressed the view that such expenses could properly be awarded at the trial court's discretion in appropriate cases under Trial Rule 41(A)(2).⁸¹

In the case of *Perry County Council v. State ex rel. Baertich*,⁸² the court of appeals was presented with the question of whether attorneys' fees are recoverable in a mandate action. The plaintiff-appellee, a public nurse, brought the action in mandate against the Board of County Commissioners to obtain her salary from appropriated public monies. The question raised on appeal was the appropriateness of the award of attorneys' fees by the trial court. The appellate court held that the general rule in Indiana, to the effect that attorneys' fees are not recoverable as damages in the absence of a statute or contract permitting recovery of those fees, applies to mandate actions. According to the court, mandate is an extraordinary legal, rather than equitable, remedy. By way of dicta, the court observed that "if the case had been in equity the attorney fees would have been proper."⁸³

Modification of judgments in the context of divorce actions came under judicial scrutiny in three recent cases. In the case of

⁷⁹295 N.E.2d at 801 (Prentice, J., concurring).

⁸⁰*Id.*

⁸¹*Id.* at 802 (Arterburn, C.J., dissenting). In the case of *State v. Palmwic Indiana Realty, Inc.*, 297 N.E.2d 479 (Ind. Ct. App. 1973), wherein the holding of *Holder* was applied to disallow the award of attorneys' fees, appraisers' fees and other expenses in an eminent domain proceeding, Judge Sullivan, in a concurring opinion, found the *Holder* dissent "extremely persuasive." *Id.*

⁸²301 N.E.2d 219 (Ind. Ct. App. 1973).

⁸³*Id.* at 222, citing *Gavin v. Miller*, 222 Ind. 459, 54 N.E.2d 277 (1944). In *Gavin*, the court stated that the "right to recover attorneys' fees from one's opponent does not exist in the absence of a statute or some agreement, though a court of equity may, under some circumstances, allow attorneys' fees to be paid out of a fund brought under its control." *Id.* at 465, 54 N.E.2d at 280.

Jackman v. Jackman,⁸⁴ the court of appeals considered the question of whether a trial court may enter a judgment different from that first entered if the change of judgment occurs within ninety days after the first judgment and entry. Following a hearing on the evidence, the trial court, on January 6, 1972, entered its decree awarding a divorce to each party. On February 18, 1972, the trial court changed its judgment and entered judgment for the plaintiff on her complaint and against the defendant on his cross-complaint. Responding to defendant-appellant's contention that the trial court lacked continuing authority to effect the change of result, the court of appeals asserted that Trial Rule 52(B) and Trial Rule 59, as well as Indiana Code section 31-1-6-3,⁸⁵ empower the trial court to effect the change of result. Thus, the court held, the trial court retained authority and did not commit error by changing the judgment within a period of less than ninety days after the rendition of the original judgment.⁸⁶

In the case of *Wilms v. Wilms*,⁸⁷ the trial court, in 1967, entered a final decree of divorce between the parties. This decree set out the total sum to be paid to the former wife, with payments to be made on a monthly installment basis. Five years later, the husband filed a petition to modify the support payments on the basis of a change in circumstances. The wife filed a motion to dismiss for failure to state a claim upon which relief could be granted, which motion was granted by the trial court. On appeal, challenge was made against the dismissal of the petition to modify support. The court of appeals upheld the ruling below, holding that, under the general rule and prior Indiana precedent, a judgment rendered for a sum in gross, even though payable in installments, is not subject to modification. The court observed that the legislature did not accord express power to a trial court to modify such alimony judgments on a showing of changed circumstances.

Also, the question of the trial court's authority to modify its order was raised in the case of *State ex rel. Dale v. Superior Court*.⁸⁸ In an original action to the supreme court for a writ of prohibition, the question was raised whether the respondent court had the authority to modify a divorce decree on its own motion under Trial Rule 60. In this case, the modified decree awarded an alimony

⁸⁴294 N.E.2d 620 (Ind. Ct. App. 1973).

⁸⁵IND. CODE § 31-1-6-3 (Burns 1973).

⁸⁶Also, in the case of *Inkoff v. Inkoff*, 306 N.E.2d 132 (Ind. Ct. App. 1974), the court held that the trial court has continuing jurisdiction to award attorneys' fees even after an appeal of the case has been perfected. For a discussion of another aspect of this case, see text accompanying note 128 *infra*.

⁸⁷301 N.E.2d 249 (Ind. Ct. App. 1973).

⁸⁸299 N.E.2d 611 (Ind. 1973).

judgment to the plaintiff in lieu of the transfer of personal property ordered under the original decree. The realtor argued that the court lacked the power or authority to modify its judgment on its own motion. The supreme court agreed. The court stated that Trial Rule 60, paragraph A, permits a modification without motion of the parties only for clerical mistakes. However, if the grounds for modification are among those cited in paragraph B, then they must be presented by a motion of the parties. In this case, because the error was not of a clerical nature and because no motion was made by the parties on other grounds, the supreme court held that the trial court had no power or authority to modify its judgment.

Further exposition of Trial Rule 60, allowing for relief from judgment or order, was rendered in a number of recent decisions. In the case of *Public Service Commission v. Schaller*,⁸⁹ one of the several questions raised under Trial Rule 60(B) was whether the relief sought was pursued within a reasonable time. The requirements explicit in this rule are that a motion for relief from judgment must qualify under one of the enumerated reasons for relief and it must be made within a reasonable time. The court of appeals observed that the motion in this cause was made some twenty-one years after entry of the judgment from which relief was sought. In addition, more than ten years had expired since the discovery of the conditions which allegedly altered the equities of the original judgment. Furthermore, the court noted, the moving party failed either to allege that the motion was filed within a reasonable time or to set out extenuating circumstances which would explain such time gaps as were found in the case. This failure was regarded as fatal to the motion and, consequently, the court found that under the facts the motion was not filed within a reasonable time.

Another case involving Trial Rule 60 was *School City of Gary v. Continental Electric Co.*⁹⁰ After successfully defending an appeal in the court of appeals,⁹¹ the plaintiff then filed with the trial court a motion pursuant to Trial Rule 60(B) (8) for the purpose of filing an amended complaint. In the original action, the plaintiff obtained injunctive relief compelling the school to accept its bid for electrical work on a new school construction project. Thereafter, the school construction project fell through and plaintiff sought to reopen the case to seek a remedy at law—namely, damages for expenses in preparing the bid and prosecuting its claim. The trial

⁸⁹299 N.E.2d 625 (Ind. Ct. App. 1973).

⁹⁰301 N.E.2d 803 (Ind. Ct. App. 1973). See note 120 *infra*.

⁹¹*School City of Gary v. Continental Elec. Co.*, 149 Ind. App. 416, 273 N.E.2d 293 (1971).

court granted the plaintiff's motion and permitted the plaintiff leave to file an amended complaint. The defendants appealed.⁹²

The court of appeals held, on the preliminary question raised by the appeal, that the defendants' appeal was proper, since the granting or denying of relief under Trial Rule 60 was deemed a final judgment from which an appeal lies.⁹³ Thus, the court of appeals held that, although the defendant-appellants were yet to plead and respond to the amended complaint, and although the trial court had made no determination concerning the plaintiff's entitlement to relief under rule 60(B)(8), the determination that the motion should be granted was itself appealable.

A further question raised in the case in regard to Trial Rule 60 was whether, under the rule, a successful party could move to amend after an initial appeal. In an extensive opinion, drawing heavily upon treatise comments and federal cases, the court held that the motion was proper and stated that "[a]lthough it is rare, the provisions of TR.60(B)(8) are available to a prevailing party."⁹⁴

The scope of the trial court's equitable discretion under Trial Rule 60 formed the basis of the supreme court's discussion in *Soft Water Utilities, Inc. v. LeFevre*.⁹⁵ Specifically, the court was presented with the question of whether a trial court has the power under Trial Rule 60(B) to change the date of its ruling on petitioner's motion to correct errors. The applicable facts of the case were that the plaintiff, upon judgment rendered for the defendant, filed its motion to correct errors with the trial court on June 30, 1972. Following a series of attempts to ascertain whether the court had acted on the motion, plaintiff was informed on July 10, 1972, by the clerk of the court, that its motion had never been received. Thereupon, on July 12, 1972, plaintiff filed another copy of the motion to correct errors. On August 11, 1972, plaintiff received notice from the judge that its motion to correct errors had been overruled on July 10th. Therefore, the thirty-day time limit for filing the praecipe under Appellate Rule 2 had expired.

⁹²The defendant also filed a motion to dismiss plaintiff's motion for relief from judgment for the reason that plaintiff's motion failed to state a claim. The trial court overruled defendant's motion, and the court of appeals held that the denial of a motion to dismiss was not a final appealable order.

⁹³See IND. R. TR. P. 60(C). Also, in the case of *Northside Cab Co. v. Penman*, 297 N.E.2d 838 (Ind. Ct. App. 1973), it was noted that, because a decision under Trial Rule 60 is a final and appealable judgment, it is a judgment which requires the filing of a motion to correct errors, pursuant to Trial Rule 59, before appeal.

⁹⁴301 N.E.2d at 810. See 4 W. HARVEY, INDIANA PRACTICE 222 (1971); 7 J. MOORE, FEDERAL PRACTICE ¶¶ 60.18[8], 60.22[1] (2d ed. 1972). See also *Ferraro v. Arthur M. Rosenberg Co.*, 156 F.2d 212 (2d Cir. 1946).

⁹⁵301 N.E.2d 745 (Ind. 1973).

The plaintiff then filed with the trial court, pursuant to Trial Rule 60(B), a motion seeking relief from the order of July 10th for the reason that it had not received notice of the entry of judgment in time to prosecute its appeal. The court granted the relief requested and ordered, *nunc pro tunc*, that the date of overruling the motion to correct errors be changed to August 14, 1972. On appeal, perfected by the plaintiff, the court of appeals granted the defendant's motion to dismiss the appeal because the praecipe was not filed within thirty days of the ruling on the motion to correct errors.⁹⁶

The supreme court overruled the decision of the appellate court⁹⁷ and held that, under the circumstances, it was within the province of the trial court to change the date of its ruling on the motion to correct errors. According to the supreme court:

A motion under TR.60(B) is addressed to the equitable discretion of the trial court. The burden is properly upon the movant to affirmatively demonstrate that relief is necessary and just. The trial court was so satisfied in this case.⁹⁸

The import of the court's ruling is that a trial court has the authority under Trial Rule 60(B) (8) to change the date on its ruling if the situation warrants. The supreme court noted that the better procedure for effecting this authority under the rule would be for a trial court to vacate the order previously entered and re-enter the order on a subsequent date. The praecipe would then have to be filed, under Appellate Rule 2(A), within thirty days after the re-entry of the court's ruling on the motion to correct errors.

The usage of Trial Rule 59 in seeking a new trial was considered in the cases of *Austin v. Durbin*⁹⁹ and *Ernst v. Schmal*.¹⁰⁰ In the *Austin* case, the appellant filed a motion to correct errors seeking a new trial on the basis of newly discovered evidence. The trial court denied the motion and the court of appeals affirmed. The appellate court based its decision on appellant's failure to overcome the strong presumption inherent in Trial Rule 59 that the alleged evidence could, with the exercise of due diligence, have been discovered in time to use at trial.

⁹⁶293 N.E.2d 788 (Ind. Ct. App. 1973). See Harvey, *Civil Procedure and Jurisdiction*, 1973 *Survey of Indiana Law*, 7 IND. L. REV. 24, 48 (1973).

⁹⁷Presumably, the supreme court's ruling will also control in the case of *Hendrickson v. American Fletcher Nat'l Bank & Trust Co.*, 301 N.E.2d 530 (Ind. Ct. App. 1973), which was decided on the basis of the earlier court of appeals decision.

⁹⁸301 N.E.2d at 749. *Accord*, *Cazarus v. Blevins*, 308 N.E.2d 412 (Ind. Ct. App. 1974).

⁹⁹310 N.E.2d 893 (Ind. Ct. App. 1974).

¹⁰⁰308 N.E.2d 732 (Ind. Ct. App. 1974).

In the *Ernst* case, a new trial was granted pursuant to Trial Rule 59(E) (1) because the trial court believed that, owing to the complexity of the issues in the case, the jury may have been confused in reaching its verdict. That is, the trial court granted the new trial because it came to the conclusion that, overall, there was error involved in the verdict, even if not specifically assigned to irregularity injected into the trial by the parties in the proceeding. The court of appeals, stressing the discretionary nature of the use of Trial Rule 59, upheld the trial court's ruling on the motion to correct errors and found the reason given sufficient.

A further question was raised as to whether the trial court was required under Trial Rule 59(E) (7) to make special findings of fact regarding the issues in the case. The court of appeals noted that special findings are required under the rule only when a new trial is granted for the reason that "the verdict, findings or judgment do not accord with the evidence."¹⁰¹ Although it was unclear from the vague reason supplied by the trial court whether its ruling was based on the failure of the verdict to accord with the evidence, the court of appeals held that the strong presumption in favor of the trial court's action in granting a new trial would operate to exclude its decision from the ambit of Trial Rule 59(E) (7). Thus, special findings were not necessary.

Another aspect of Trial Rule 59 received consideration in the case of *Baker v. American Metal Climax Corp.*¹⁰² In an action to withdraw a submission from the judge pursuant to Trial Rule 53.1,¹⁰³ the question was presented whether Trial Rule 59(D) operated to extend the time in which a judge may rule on a motion to correct errors on affidavits. Trial Rule 59(D) provides, in part, that an opposing party has fifteen days after the service of affidavits in which to serve opposing affidavits. The judge contended that the thirty-day period provided by Trial Rule 53.1 did not commence to run until the time had expired for the filing of a counter-affidavit under the Trial Rule 59(D) provision.

The supreme court disagreed, holding that the provision of Trial Rule 59(D) did not extend the time allotted for ruling on motions under Trial Rule 53.1. The court noted that, if under the circumstances of the case, thirty days proved an insufficient period

¹⁰¹*Id.* at 736.

¹⁰²307 N.E.2d 49 (Ind. 1974).

¹⁰³Trial Rule 53.1 provides in part:

Upon failure of a court to enter a ruling upon a motion within thirty (30) days after it was heard or thirty (30) days after it was filed, if no hearing is required, the submission of such motion may be withdrawn, and the judge before whom the cause is pending may be disqualified therein

for ruling on the motion, the time could have been extended by agreement of the parties or by order of the court. Since neither procedure was followed and since the thirty days had expired without a ruling on the motion, the judge lost jurisdiction of the case.

The case of *Hendrixson v. State*¹⁰⁴ involved a belated assertion of error to a decision denying post-conviction relief pursuant to Indiana Post-Conviction Rule 1. Post-conviction relief was denied on July 21, 1972, and on August 9, 1972, petitioner filed a motion to correct errors addressed to the denial of post-conviction relief. On October 9 of the same year, a petition to file a "belated supplemental motion to correct errors" was filed. The court of appeals held that Trial Rule 59(G) governed the situation because a post-conviction proceeding "is in the nature of a civil action."¹⁰⁵ Since Trial Rule 59(G) requires that the motion be filed sixty days after the entry of judgment, amendments or additions after the sixty-day period are disallowed and discounted by the reviewing court.¹⁰⁶ Thus, the court of appeals held, the motion to correct errors in response to a denial of post-conviction relief must be filed within sixty days of that denial and cannot be amended thereafter.

Finally, the nature of proceedings supplemental to execution under Trial Rule 69(E) was the topic of examination in the case of *Myers v. Hoover*.¹⁰⁷ In July, 1961, the plaintiff was awarded a money judgment against defendant by the Industrial Board and in July, 1971, one decade later, the plaintiff caused an execution to be issued against the defendant. The execution having been returned unsatisfied, the plaintiff then initiated proceedings supplemental to execution. The defendant filed a motion to dismiss based on the bar of the statute of limitations. The trial court originally granted the dismissal but thereafter altered its ruling pursuant to the plaintiff's motion to correct errors.

The court of appeals affirmed this latter ruling of the trial court. The appellate court held that proceedings supplemental to execution are not subject to the defense of the statute of limitations for the following reason:

Given the terms of Trial Rule 69(E) and the procedure thereunder, we are compelled to the conclusion that in adopting the new rule, our Supreme Court intended

¹⁰⁴310 N.E.2d 569 (Ind. Ct. App. 1974).

¹⁰⁵*Id.* at 570, quoting *Hoskins v. State*, 302 N.E.2d 499, 501 (Ind. 1973). *Accord*, *Pettit v. State*, 310 N.E.2d 81 (Ind. Ct. App. 1974).

¹⁰⁶*See Ver Hulst v. Hoffman*, 286 N.E.2d 214 (Ind. Ct. App. 1972). *See also Harvey, Civil Procedure and Jurisdiction, 1973 Survey of Indiana Law*, 7 IND. L. REV. 24, 46 (1973).

¹⁰⁷300 N.E.2d 110 (Ind. Ct. App. 1973).

that proceedings supplemental to execution no longer be considered new and independent civil actions. Rather, they appear to be a mere continuation of the original cause.¹⁰⁸

The court of appeals also noted that, although in proceedings supplemental to execution a motion to correct errors is not required under Trial Rule 59(G) as a condition precedent to appeal, it was not error for the trial court to entertain the motion to correct errors in such a case.

F. Appeal

The role of the motion to correct errors in appellate practice also received a significant amount of attention this past term. In the case of *Moore v. Spann*,¹⁰⁹ on a petition for rehearing, the appellants argued that Appellate Rule 7.3 provided an alternative method of determining what shall be included in the record and that, in fact, Appellate Rule 7.3 was complete in itself and independent of the requirements of Appellate Rule 7.2.

The argument was advanced that Appellate Rule 7.3, governing an appeal based upon an agreed statement, had the effect of eliminating the requirement of filing a motion to correct errors. The court of appeals indicated that, whereas this argument might have merit under federal practice procedure, the result is otherwise in Indiana state practice. That is, a certified copy of a motion to correct errors (or an assignment of errors, as the case may be) is a prerequisite to an appeal and serves the function of an "appellant's complaint" on appeal. Thus, the court of appeals held that the inclusion of the motion to correct errors is a jurisdictional act and, hence, is required in all cases, even when there is an agreed record on appeal.

In addition, in the case of *John Dehner, Inc. v. Northern Indiana Public Service Co.*,¹¹⁰ the defendant filed a motion to dismiss the plaintiff's complaint, which motion was granted by the trial court. The plaintiff did not file a motion to correct errors in the trial court, but rather assigned error in the appellate court. The court of appeals dismissed the appeal for failure to file the motion to correct errors and stated that, even in this case, as in the case of a final judgment upon an agreed record, the appealing party must file with the trial court a motion to correct errors as a condition precedent to an appeal. The only exceptions to

¹⁰⁸*Id.* at 113.

¹⁰⁹302 N.E.2d 825 (Ind. Ct. App. 1973). The original opinion appeared at 298 N.E.2d 490 (Ind. Ct. App. 1973).

¹¹⁰297 N.E.2d 481 (Ind. Ct. App. 1973).

this requirement, the court noted, are enumerated in Trial Rule 59(G) and none of the exceptions were applicable in this case.

In the case of *City of Gary v. Archer*,¹¹¹ a punitive damage award was entered against the City. After closing argument, instructions were given which related to those damages; no objection was made at that time by the City. The first objection to the punitive damage award was raised in the City's motion to correct errors. Hence, according to the court of appeals, the objection was first raised on appeal. The appellate court held that it was without jurisdiction to consider an objection made for the first time on appeal.¹¹² Thus, no timely objection having been made during the trial, the point was not preserved by raising it initially in the motion to correct errors.

*Davis v. Davis*¹¹³ involved the question of whether a party who is adversely affected by the granting of a motion to correct errors in the trial court must, as a condition precedent to appeal of that ruling, file an additional motion to correct errors alleging as error the trial court's sustaining of the prior motion. In this case, the trial court entered a judgment granting the wife a divorce, and she filed a motion to correct errors. The trial court subsequently granted her motion and entered an amended judgment which adjusted the property division previously ordered by the court. The husband filed his praecipe for appeal from the trial court's granting of the wife's motion to correct errors. The wife moved to dismiss or affirm on the ground that jurisdiction was lacking in the appellate court because no second motion to correct had been filed.

Originally, the court of appeals held that it was unnecessary to interpose a second motion to correct errors.¹¹⁴ The court based its conclusion on the language of Appellate Rule 2(A), which requires only that the praecipe follow a "ruling on" the motion, and upon Appellate Rule 4(A), which permits an appeal from a ruling either granting or denying the motion to correct errors. Thus, the court asserted that the party against whom the motion is granted is sufficiently aggrieved by the ruling to appeal from the decision on the original motion.¹¹⁵

However, on rehearing, the court of appeals overruled its earlier decision and held that the second motion to correct errors is a prerequisite to appeal when the first motion to correct errors

¹¹¹300 N.E.2d 687 (Ind. Ct. App. 1973).

¹¹²See *Aocker v. Buell*, 147 Ind. App. 422, 261 N.E.2d 894 (1970); *Monon R.R. v. New York Central R.R.*, 141 Ind. App. 277, 227 N.E.2d 450 (1967).

¹¹³306 N.E.2d 377 (Ind. Ct. App. 1974).

¹¹⁴*Davis v. Davis*, 295 N.E.2d 837 (Ind. Ct. App. 1973).

¹¹⁵*Id.* at 839.

is accompanied by a new entry or judgment.¹¹⁶ The court relied heavily upon the supreme court's holding in *State v. Deprez*,¹¹⁷ a case decided in the interim between the husband's first appeal and the rehearing. In *Deprez*, in similar circumstances, the court found the second motion necessary, focusing on the fact that Appellate Rule 4(A) requires that appeals be taken only from *final* judgments. Thus, following the *Deprez* rationale, the court of appeals held that, when the granting or denial of a motion to correct errors is accompanied by a new entry or judgment consisting of additional findings, amendments, or other alterations of the prior judgment, the new entry constitutes the final judgment from which appeal is taken. Therefore, a motion to correct errors in response to the new entry must be filed as a prerequisite to appeal.¹¹⁸ Otherwise, the court observed, the appellate court is uninformed as to the alleged errors in the trial court's ruling on the original motion, and the trial court is denied the opportunity to correct those alleged errors.

In the case of *Hendrickson v. American Fletcher National Bank & Trust Co.*,¹¹⁹ the question was whether an order which sustained a motion to dismiss was an appealable order when no judgment was entered thereon.¹²⁰ In this case, the defendant moved to dismiss for the following reasons: (1) there was no jurisdiction over the subject matter, (2) the complaint was barred by the statute of limitations, and (3) there was a failure to state a claim upon which relief could be granted. The trial court's order granting the motion did not specify which of the bases of the defendant's motion justified dismissal. The court of appeals therefore assumed for purposes of review that the trial court based its ruling on all three points. One of those was the failure to state a claim upon which relief could be granted. Thus, under a Trial Rule 12(B)(6) motion, the court noted, the plaintiff had ten days during which, as a matter of right, he could plead over

¹¹⁶306 N.E.2d at 379.

¹¹⁷296 N.E.2d 120 (Ind. 1973). In fact, the *Deprez* case involved an amended judgment under Trial Rules 52(B) and 59(E). Although the plaintiffs filed a motion to correct errors after the original judgment dismissing the case, they failed to file a second motion after the amended judgment was entered. Therefore, the supreme court dismissed the appeal.

¹¹⁸*Accord*, *Wyss v. Wyss*, 311 N.E.2d 621 (Ind. Ct. App. 1974).

¹¹⁹301 N.E.2d 530 (Ind. Ct. App. 1973).

¹²⁰*Cf. School City of Gary v. Continental Elec. Co., Inc.*, 301 N.E.2d 803 (Ind. Ct. App. 1973), wherein the court held that the *denial* of a motion to dismiss pursuant to Trial Rule 12(B)(6) was not in itself a final appealable order. The case is discussed further at the text accompanying notes 90-92 *supra*.

before judgment was entered.¹²¹ According to the court of appeals, the granting of the motion to dismiss would become a final appealable judgment only if, after the expiration of the ten days, the trial court had made an entry showing that "the plaintiff having failed to plead over, the cause is dismissed."¹²²

Here, the trial court made no such entry. The defendant's motion to dismiss was granted on May 13, 1970. On March 1, 1972, the trial court entered an order which confirmed the action of May, 1970, and the case was again adjudged dismissed. The critical distinction in the case was that the May, 1970, entry in the order book indicated only that the defendant's motion to dismiss was sustained. The March, 1972, entry constituted the judgment of dismissal. Therefore, the plaintiff's motion to correct errors filed on April 28, 1972, was held by the court of appeals to be a timely motion in view of the fact that no judgment of dismissal was actually entered until March, 1972.

Two recent cases, *Sears Roebuck & Co. v. Hutchens*¹²³ and *Spencer v. Miller*,¹²⁴ underscored the importance of complying with the time restrictions for filing a praecipe pursuant to Appellate Rule 2. The praecipe, designating what is to be included in the record of proceedings, must be filed with the trial court, according to Appellate Rule 2(A), within thirty days after the court's ruling on the motion to correct errors.

In the *Sears* case, the praecipe for the record was filed by appellant on the eighty-ninth day following the ruling on the motion to correct errors. The court of appeals, pursuant to Appellate Rule 14(B), denied the appellant's petition for extension of time to prepare the record, and the supreme court accordingly dismissed appellant's petition for transfer. In its opinion, the supreme court emphasized that, although the praecipe may be simple and brief—often amounting to nothing more than a one sentence request—it is essential in all cases that the praecipe be filed within the thirty-day period. Similarly, stringent adherence to time restrictions was endorsed in the *Spencer* case, wherein the praecipe was filed approximately twelve days after the expiration of the thirty-day period. The court of appeals sustained the appellee's motion to dismiss the appeal.

¹²¹Trial Rule 12(B)(8) provides in part:

When a motion to dismiss is sustained for failure to state a claim under subdivision (B)(6) of this rule the pleading may be amended once as of right pursuant to Rule 15(A) within ten (10) days after service of notice of the court's order sustaining the motion and thereafter with permission of the court pursuant to such rule.

¹²²301 N.E.2d at 531-32.

¹²³297 N.E.2d 807 (Ind. 1973).

¹²⁴297 N.E.2d 491 (Ind. Ct. App. 1973).

In a related context, the court of appeals upheld the time restrictions for filing an assignment of errors. In the case of *Means v. Seif Material Handling Co.*,¹²⁵ review of an Industrial Board award was sought in the court of appeals. The appellant on three occasions was successful in obtaining extensions of the ninety-day period required under Appellate Rule 3(B) for filing the record. The last petition extended the time to November 10, 1972. Although the record of the proceedings before the Board was timely filed with the appellate court on that date, the record did not include an assignment of errors. On March 14, 1973, appellant filed a petition to "File Omitted Assignment of Errors."

The appeal was dismissed for the reason that the record was not complete in that it did not contain an assignment of errors and, therefore, the record was not filed within the time allotted. The court declared that, absent timely filing of an assignment of errors, the court has no jurisdiction to review an award of the Industrial Board.¹²⁶ In a concurring opinion, however, Judge Sullivan argued for recognition of the court's inherent power to permit belated civil appeals for good cause shown. His discussion includes a comprehensive summary of Indiana case law supporting this proposition.¹²⁷

A new application of the assignment of errors was established in the case of *Inkoff v. Inkoff*.¹²⁸ In this divorce action, the trial court entered an award of attorneys' fees in order to enable the appellee to defend the appeal. This entry was effected after the court had ruled upon a motion to correct errors and after the appeal was perfected. In the appellate court opinion, attention was directed to the method by which that entry could be reviewed. The court of appeals stated that, under Appellate Rule 7.2, a motion to correct errors is required in all appeals from final judgments, and a specific assignment of errors is required in all appeals from interlocutory orders. Neither procedure was directly applicable in the present situation because the award of attorneys' fees came after the final judgment and was neither final nor interlocutory in nature. The court proposed that the gap in the rules be resolved by requiring the assignment of errors to include the record of any post-judgment proceedings

¹²⁵300 N.E.2d 895 (Ind. Ct. App. 1973).

¹²⁶In dicta, the court suggested that the requirement for the filing of an assignment of errors from an award by the Industrial Board be abolished altogether, since the assignment is merely perfunctory and serves no useful purpose. *Id.* at 896.

¹²⁷*Id.* at 897.

¹²⁸306 N.E.2d 132 (Ind. Ct. App. 1974).

from which an appeal is taken and for which a motion to correct errors is not required.

Appeals from interlocutory orders were considered in a number of recent cases. In *Sekerez v. Board of Sanitary Commissioners*,¹²⁹ the appellant filed an appeal from an interlocutory order entered by the trial court. This order stipulated that the suit would be dismissed unless the appellant posted a bond in the amount of \$5,000,000 payable to the defendant Board in the event the defendant prevailed. The appellant failed to post the bond, and the trial court entered a final judgment dismissing the action. The appeal was taken solely from the interlocutory order previously entered.

The court of appeals asserted that it lacked jurisdiction to entertain the appeal because the interlocutory order did not fall within any category of interlocutory order set forth in Appellate Rule 4(B).¹³⁰ However, the court decided that jurisdiction over the appeal would have been proper in the supreme court, which is empowered to hear appeals from "any other interlocutory order" under rule 72(b) as adopted by the Indiana General Assembly.¹³¹ This rule, which was not incorporated into the Indiana Rules of Procedure as adopted by the supreme court, has been held nonetheless effective in furnishing jurisdiction to the supreme court in such cases.¹³² Thus, the appellate court ordered the appeal transferred to the Indiana Supreme Court pursuant to Appellate Rule 15(L). This interpretation was overturned in the supreme court.¹³³ The court there held that it was the intent of Appellate Rule 4(B) that *all* interlocutory appeals should go to the court of appeals. Therefore, interlocutory appeals, whether taken under "rule 72(b)" or Appellate Rule 4, go to the court of appeals.

In the case of *Murray v. Murray*,¹³⁴ the court of appeals decision illustrates the distinction between an appeal of a final order and an appeal of an interlocutory order, and the relationship of both to the motion to correct errors. In this case, a motion was filed to modify a custody and support provision of a previous divorce decree. On June 29, 1973, the trial court issued its order that custody and care of minor children be awarded the

¹²⁹302 N.E.2d 536 (Ind. Ct. App. 1973).

¹³⁰*Id.* at 537. *Cf.* *Sekerez v. Gary Redev. Comm'n*, 301 N.E.2d 372 (Ind. Ct. App. 1973), wherein, only one month earlier, another district of the court of appeals took jurisdiction of an interlocutory appeal in a similar case. See text accompanying note 32 *supra*.

¹³¹IND. CODE § 34-5-1-1 (Burns 1973).

¹³²*See, e.g.,* *Richards v. Crown Point Community School Corp.*, 256 Ind. 347, 269 N.E.2d 5 (Ind. 1971).

¹³³*Sekerez v. Board of Sanitary Comm'rs*, 304 N.E.2d 533 (Ind. 1973).

¹³⁴309 N.E.2d 831 (Ind. Ct. App. 1974).

husband until further order of the court or until modified by the hearing on the petition for modification to be held approximately two months later. On August 21, 1973, the appellant filed a motion to correct errors directed at the June 29 order. Thereafter, the matter came to hearing on September 26, 1973, at which time the trial court denied the motion to correct errors and granted the petition for modification. Judgment was entered the following day. The wife did not file a motion to correct errors addressed to this judgment but, instead, filed a praecipe with the appellate court.

The court of appeals dismissed the appeal. In so doing, it pointed out that a motion to correct errors, pursuant to Trial Rule 59(C), must be filed not later than sixty days *after judgment*. Here, no motion to correct errors was filed at any time after judgment. Further, the court indicated that the appeal from the interlocutory order of June 29 was not properly taken since the wife treated that appeal as an appeal from a final judgment. The court noted that appeals from interlocutory orders have different requirements from those established for appeals from final judgments. For instance, in an interlocutory appeal, no motion to correct errors is required,¹³⁵ the appeal must be perfected within thirty days instead of ninety,¹³⁶ and a brief must be filed within ten days after the filing of the record.¹³⁷ Thus, the motion to correct errors addressed to the interlocutory order was ineffective and raised no question for appeal.

The types of interlocutory orders which may be appealed were considered in two recent cases. In *Greyhound Lines, Inc. v. Vanover*,¹³⁸ an appeal from an order granting an amended request for production of documents was dismissed. In the case of *Bell v. Wabash Valley Trust Co.*,¹³⁹ an order denying a partial distribution of funds from a trust was held to be a nonappealable interlocutory order.¹⁴⁰ Both cases emphasized that appeals from

¹³⁵See IND. R. TR. P 59(G).

¹³⁶See IND. R. APP. P. 3.

¹³⁷See IND. R. APP. P. 8.1.

¹³⁸311 N.E.2d 632 (Ind. Ct. App. 1974).

¹³⁹297 N.E.2d 924 (Ind. Ct. App. 1973).

¹⁴⁰*Cf. Hawkins v. Hawkins*, 309 N.E.2d 177 (Ind. Ct. App. 1974), wherein it was held that a sale order in a partition proceeding, although denominated "interlocutory" under IND. CODE § 32-4-5-4 (Burns 1973), was in fact a final appealable order. However, the case of *In re Estate of Barnett*, 307 N.E.2d 490 (Ind. Ct. App. 1974), qualified such a holding to the effect that an order of partition is not an appealable final judgment if the order specifies that a further order making final distribution is to be forthcoming. The court noted that "[a]s a general rule, a final judgment which is appealable is one which disposes of all of the issues as to all of the parties and puts an end to the

interlocutory orders must be authorized specifically by the Indiana Constitution, the statutes, or the court rules.¹⁴¹ Moreover, any authorization is to be strictly construed.¹⁴² Since, in neither case, was the order appealed from among the genre of interlocutory orders authorized by Appellate Rule 4(B), the appeals were held improper.

The requirements for a petition to transfer pursuant to Appellate Rule 11(B) were discussed in the case of *Baker v. Fisher*.¹⁴³ The supreme court, noting that the petition for transfer in this case did not meet any of the grounds contained in the rule, denied the transfer. The court stated that a petitioner must allege facts with ample particularity in order to bring his petition within one of the stipulated grounds for transfer. The petition in this case merely asserted, in general terms, that the court of appeals erred in its determination of the facts. This assertion was found insufficient. The supreme court noted that it, nonetheless, has the power to consider a petition for transfer which does not fall within the categories established by Appellate Rule 11(B). However, the court went on, the granting of such a petition is a rare occurrence and special need must be amply demonstrated to warrant this unusual dispensation.

In conclusion, mention must be made of a common error which recurred in numerous cases this past term.¹⁴⁴ Succinctly stated, the rule is firmly established that a negative judgment against the party bearing the burden of proof below cannot be attacked on appeal on the ground that the evidence is insufficient

particular case." *Id.* at 494, quoting *Thompson v. Thompson*, 286 N.E.2d 657, 659 (Ind. 1972).

¹⁴¹*Anthrop v. Tippecanoe School Corp.*, 257 Ind. 578, 277 N.E.2d 169 (1972); *Neal v. Hamilton Circuit Court*, 248 Ind. 130, 224 N.E.2d 55 (1967); *State ex rel. Sanders v. Circuit Court*, 243 Ind. 343, 182 N.E.2d 781 (1962); *Haag v. Haag*, 240 Ind. 291, 163 N.E.2d 243 (1959); *Seaney v. Ayres*, 238 Ind. 493, 151 N.E.2d 295 (1958); *Chapman v. Chapman*, 231 Ind. 556, 109 N.E.2d 724 (1953).

¹⁴²*Seaney v. Ayres*, 238 Ind. 493, 151 N.E.2d 295 (1958); *Chapman v. Chapman*, 231 Ind. 556, 109 N.E.2d 724 (1953).

¹⁴³296 N.E.2d 882 (Ind. 1973).

¹⁴⁴*See, e.g., Pettit v. State*, 310 N.E.2d 81 (Ind. Ct. App. 1974); *Danes v. Automobile Underwriters, Inc.*, 307 N.E.2d 902 (Ind. Ct. App. 1974); *Hays v. Hartfield L-P Gas*, 306 N.E.2d 373 (Ind. Ct. App. 1974); *Inkoff v. Inkoff*, 306 N.E.2d 132 (Ind. Ct. App. 1974); *Hippensteel v. Karol*, 304 N.E.2d 796 (Ind. Ct. App. 1973); *Yellow Mfg. Acceptance Corp. v. Voss*, 303 N.E.2d 281 (Ind. Ct. App. 1973); *Lindenborg v. M & L Builders & Brokers, Inc.*, 302 N.E.2d 816 (Ind. Ct. App. 1973); *Apple v. Apple*, 301 N.E.2d 534 (Ind. Ct. App. 1973).

to sustain the decision of the trial court.¹⁴⁵ An appeal from a negative verdict or judgment may, on the other hand, be raised on the ground that the decision is contrary to law, but here too the standard of review is rigid—only if the evidence is without conflict and leads to only one conclusion, and the trial court reached a contrary conclusion, will the decision be disturbed as contrary to law.¹⁴⁶ Upon such review, the appellate court must consider only the evidence most favorable to the decision of the trial court.¹⁴⁷ Thus, the bases of review of a negative judgment are limited and the standards applied are stringent. Indiana practitioners are reminded, however, that appeal of a negative judgment is unavailing on the ground of insufficiency of the evidence.

V. Constitutional Law

*James W. Torke**

The following discussion attempts to highlight court decisions, both federal and state, which have involved both constitutional issues and Indiana law. As could have been expected, the cases reflect a general concentration on problems of free speech, free press and equal protection.

A. The First Amendment

For a few years now, the general public has been acquainted with the controversy involving an unofficial student newspaper, the *Corn Cob Curtain*. During the 1971-1972 school year, four issues of the paper were published in various Indianapolis high schools. The distribution of a fifth issue was blocked by school authorities upon the grounds that the *Corn Cob Curtain* was obscene. Plaintiffs, as representatives of a class of high school students under the jurisdiction of the Indianapolis school system,

¹⁴⁵*Houser v. Board of Comm'rs*, 252 Ind. 312, 247 N.E.2d 675 (1969); *State Farm Life Ins. Co. v. Spidel*, 246 Ind. 458, 202 N.E.2d 886 (1964); *Engelbrecht v. Property Developers, Inc.*, 296 N.E.2d 798 (Ind. Ct. App. 1973); *Columbia Realty Co. v. Harrelson*, 293 N.E.2d 804 (Ind. Ct. App. 1973); *Hiatt v. Yergin*, 284 N.E.2d 834 (Ind. Ct. App. 1972).

¹⁴⁶*Senst v. Bradley*, 275 N.E.2d 573 (Ind. Ct. App. 1971). *Accord*, *Edwards v. Wyllie*, 246 Ind. 261, 203 N.E.2d 200 (1964); *Jones v. Greiger*, 130 Ind. App. 526, 166 N.E.2d 868 (1960).

¹⁴⁷*Jones v. State*, 244 Ind. 682, 195 N.E.2d 460 (1964); *Senst v. Bradley*, 275 N.E.2d 573 (Ind. Ct. App. 1971); *Walting v. Brown*, 139 Ind. App. 18, 211 N.E.2d 803 (1965).

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gained relief from the ban in federal district court.¹ Defendants' appeal to the Court of Appeals for the Seventh Circuit, in *Jacobs v. Board of School Commissioners*,² was unsuccessful.

The initial ban emerged from a rule preventing sales or solicitation on school grounds without the express prior approval of the general superintendent. As indicated above, court approval was not forthcoming. However, Judge Steckler's expression that such a broad prior restraint was unconstitutional³ caused school authorities to amend the rules in order to comply more closely with first amendment standards. These amended rules were the subject of the court of appeals' concern.

Judge Fairchild prefaced his discussion of the amended rules by noting that the severe sanctions, including suspension and even expulsion, to be visited upon violators of the new rules justified the court in subjecting the rules to the rigorous demands of precision associated with criminal penalties. Against such standards, the most general of the amended proscriptions was held to be both vague and overbroad. This rule provided that:

No student shall distribute in any school literature that is . . . either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others.⁴

The above proscription seems clearly to have been an attempt to distill the holding of *Tinker v. Des Moines School District*,⁵ which struck down a ban, in an Iowa high school, on the wearing of black arm bands to protest the Vietnam war.⁶ This apparent source of the proposed rule was not lost upon the court of appeals. However, Judge Fairchild suggested that, merely because a regulation appears to track selected language of a Supreme Court opinion, there

¹*Jacobs v. Board of School Comm'rs*, 349 F. Supp. 605 (S.D. Ind. 1972).

²490 F.2d 601 (7th Cir. 1973), *cert. granted*, 94 S. Ct. 2638 (1974).

³Judge Steckler emphasized the holding of *Fujishima v. Board of Educ.*, 460 F.2d 1355 (7th Cir. 1972), wherein an analogous general restraint upon Illinois high school pupils was deemed unconstitutional.

⁴490 F.2d at 604.

⁵393 U.S. 503 (1969).

⁶For example, Mr. Justice Fortas stated:

Clearly, the prohibition of expression of one particular opinion, at least without evidence that *it is necessary to avoid material and substantial interference with school work or discipline*, is not constitutionally permissible.

Id. at 511 (emphasis added).

is no assurance that it will be sufficiently precise in the form of a regulation to satisfy first amendment due process standards. As a bare regulation, after all, it lacks the specific setting and context of a discrete case. Because the federal court lacks power authoritatively to construe the state regulation,⁷ and because the rule came to the court fresh without the cartography of experience under it, the court felt the rule on its face too imprecise to give fair warning to students. For example, the court worried whether decorum in the lunchroom is a "normal educational . . . purpose," whether "strident discussion there" is a "disruption," and when such disruption becomes "significant."⁸

Yet, the dilemma of school authorities who feel compelled to regulate literature available in schools is emphasized by the court's own reference to the "*Tinker* standard." For instance, having projected the example of robust luncheon debate of an article criticizing a teacher, Judge Fairchild remarked that, in the absence of extraordinary circumstances, "school authorities could not reasonably forecast substantial disruption of or material interference with school discipline or activities arising from such incidents." Likewise, such unknowns were found to highlight the defective nature of another regulation which sought to prohibit any distribution of literature when classes were in session in the school of distribution.¹⁰ To some extent, then, the court seemed to be subjecting the regulations to the very standard it had found unacceptable in the form of a general ban. Perhaps the school authorities are asked for too much precision, at least in regard to the first general prescription discussed above. After all, the Supreme Court, in *Grayned v. City of Rockford*,¹¹ upheld a city ordinance which prohibited any "noise or diversion which disturbs or tends to disturb the peace or good order"¹² of a school in session. Therefore, while the flat ban on distribution while classes are in session may be fatally flawed for failure to impose any standards at all, the more general regulation incorporating the *Tinker* test may fare better in the Supreme Court.

Less troublesome was the court's invalidation of regulations which: (1) sought to ban any distribution of literature, except advertisements, not written by a student, teacher or school em-

⁷490 F.2d at 606.

⁸*Id.* at 605. Similarly, Mr. Justice Douglas bemoaned an Arizona loyalty oath: "Would a teacher be safe and secure in going to a Pugwash Conference?" *Elfbrandt v. Russell*, 384 U.S. 11, 16-17 (1966).

⁹490 F.2d at 606.

¹⁰*Id.* at 609.

¹¹408 U.S. 104 (1972).

¹²*Id.* at 108.

ployee,¹³ (2) required that all literature bear the names of persons or organizations participating in publication,¹⁴ and (3) barred the sale of all literature except by groups organized to benefit the school involved.¹⁵ In regard to the last provision, the court recognized a legitimate interest in preserving school facilities from becoming centers of commercial activity, but felt that the teachings of *United States v. O'Brien*¹⁶ demanded less intrusive modes of regulation when first amendment interests incidentally are affected.

Finally, the court invalidated a regulation which prohibited distribution of literature which is "obscene as to minors."¹⁷ The court suggested that this ban failed to meet the demands of specificity found in *Miller v. California*.¹⁸ In any case, it was clear to the court that the *Corn Cob Curtain*, if profane, was not obscene.¹⁹

Youth did not fare so well in its attempts to hold the "Erie Canal 'Soda' Pop Festival." The music festival, scheduled for late summer of 1972, was enjoined and, in *Smith v. State Board of Health*,²⁰ the Indiana Court of Appeals upheld the injunction. The promoters had claimed, *inter alia*, that the injunction violated the right of young people peaceably to assemble and, as the court put it, "do their thing."²¹ The court found a sufficient showing of a "clear and present danger which was grave and immediate to the public interest on the basis of health hazards, and the interruption of police, fire, and emergency services."²² Whether or not the court applied the proper first amendment test, it seems to have paid little heed to several fundamental issues implicit in the case.

¹³490 F.2d at 606.

¹⁴*Id.* The court quite properly invoked *Talley v. California*, 362 U.S. 60 (1960).

¹⁵490 F.2d at 607.

¹⁶391 U.S. 367 (1968).

¹⁷490 F.2d at 609.

¹⁸413 U.S. 15 (1973). The court refused to consider the degree to which *Miller* may have affected the legitimacy of various obscenity regulations arguably sanctioned by *Ginsberg v. New York*, 390 U.S. 629 (1968). For a discussion of obscenity regulations, see text accompanying notes 30-41 *infra*. The court also refused to decide the question of whether school authorities might more readily regulate "profanity" in grade schools, specifically confining the reach of its decision to high schools. 490 F.2d at 610.

¹⁹490 F.2d at 610, *citing* *Papish v. Board of Curators*, 410 U.S. 667 (1973); *Cohen v. California*, 403 U.S. 15 (1971). *See also* *Kois v. Wisconsin*, 408 U.S. 229 (1972). It was on this matter that Judge Christensen's partial dissent most vigorously focused.

²⁰307 N.E.2d 294 (Ind. Ct. App. 1974). *See also* *Smith v. Indiana State Bd. of Health*, 303 N.E.2d 50 (Ind. Ct. App. 1973).

²¹307 N.E.2d at 300.

²²*Id.*

Initially, it seems pertinent for the court to have considered the extent to which rock festivals are entitled to first amendment protection. The underlying question of the place of music in the realm of protected speech is one which remains largely unsettled.²³ Resolution of that issue becomes important when one recalls that the government shoulders an especially onerous burden in the prior restraint of first amendment freedoms.²⁴ The matter becomes most sensitive when, as in the present case, the restraint springs from an ex parte hearing, a procedure which, except in the most exigent circumstances, is most inimical to notions of first amendment due process.²⁵ In this light, appellants' attack on the evidence supporting issuance of the injunction, which evidence seemed mainly to consist of dire happenings at other rock festivals around the nation, seems deserving of more probing analysis than the court saw fit to afford.

Gary realtors also found their assertion of first amendment rights unavailing in *Barrick Realty, Inc. v. City of Gary*.²⁶ Plaintiffs had challenged the validity of a 1972 city ordinance, backed by criminal sanctions, which forbade placement of "For Sale" signs in residential areas. The ordinance was designed to hamper "block-busting" and hence to encourage "stable integrated neighborhoods."²⁷ The succinct opinion by Judge Cummings found conveniently at hand the Supreme Court's opinion in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*²⁸ upholding the application to a newspaper of an ordinance which forbade the aiding of sexual discrimination in hiring practices. The core of the *Pittsburgh Press* decision rested on the weighty and legitimate governmental purpose of preventing discrimination, which purpose was found to overbalance any free speech interest involved. The commercial aspects of the want ads involved diluted the protection to be afforded the speech, especially "when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."²⁹ The court of appeals

²³See, e.g., *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 603 (D.C. Cir. 1973) (dissenting opinion of Bazelon, C.J.). See also Comment, *Drug Songs and the Federal Communications Commission*, 5 U. MICH. J.L. REFORM 334 (1972).

²⁴See, e.g., *Carroll v. President & Comm'rs*, 393 U.S. 175 (1968).

²⁵See Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970). The court seemed more alert to the procedural issues in *Smith v. Indiana State Bd. of Health*, 303 N.E.2d 50 (Ind. Ct. App. 1973), another case involving the injunction of a proposed music festival.

²⁶491 F.2d 161 (7th Cir. 1974).

²⁷*Id.* at 165.

²⁸413 U.S. 376 (1973).

²⁹*Id.* at 389. Chief Justice Burger and Justices Stewart, Douglas and Blackmun dissented.

decision is informed with an almost identical rationale. While noting that the commercial aspects of the signs were alone not enough to meet the first amendment claim, the court found the high purpose of the ordinance sufficiently compelling to justify the incidental restriction on speech.

Indiana, as the rest of the nation, felt the impact of the recent United States Supreme Court obscenity decisions.³⁰ In *Mohney v. State*,³¹ the Indiana Supreme Court, speaking through Chief Justice Arterburn, struck down the Indiana statute proscribing the sending of obscene literature into the state.³² The *Mohney* case was one of two cases returned to the Indiana Supreme Court for reconsideration in light of the late cluster of obscenity cases.³³ The other case, *Stroud v. State*,³⁴ involved a conviction for the sale of obscene literature by an employee of Mohney. In brief opinions betraying just a hint of petulance, the Indiana Supreme Court found the Indiana statutes unconstitutional in that they were "too general in nature, [not setting] out specifically the sexual or obscene acts which, when depicted . . . constitute a violation of the statute."³⁵

The provisions involved were cast in the general terms of "obscene, lewd, indecent or lascivious"³⁶ and, hence, lacked the type of specificity frequently deemed incumbent upon legislation, especially as it concerns speech. It is worth noting, however, that a certain hospitality toward extant state statutes can be found in the recent obscenity opinions by Chief Justice Burger. For example, the Chief Justice, in the course of detailing the permissible scope of regulation, several times (and one must assume, consciously) pointed out that, for a proscription to be acceptable, the type of material proscribed "must be specifically defined by the applicable state law, as written or authoritatively construed."³⁷ Arguably, at least, the

³⁰*E.g.*, *Kaplan v. California*, 413 U.S. 115 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973).

³¹300 N.E.2d 66 (Ind. 1973).

³²IND. CODE § 35-30-10-3 (IND. ANN. STAT. § 10-2803a, Burns Repl. 1956).

³³See note 30 *supra*. Mohney's litigation may be traced in *Mohney v. State*, 257 Ind. 394, 276 N.E.2d 517 (1971), *vacated and remanded*, 413 U.S. 911 (1973).

³⁴300 N.E.2d 100 (Ind. 1973). Stroud's conviction under IND. CODE § 35-30-10-1 (IND. ANN. STAT. § 10-2803, Burns Repl. 1956) had been upheld in *Stroud v. State*, 257 Ind. 204, 273 N.E.2d 842 (1971), *vacated and remanded*, 413 U.S. 911 (1973).

³⁵This statement is found both in *Mohney*, 300 N.E.2d at 67, and in *Stroud*, 300 N.E.2d at 101.

³⁶257 Ind. at 207, 273 N.E.2d at 844.

³⁷*Miller v. California*, 413 U.S. 15, 24 (1973). The Chief Justice further stated:

We do not hold, as Mr. Justice Brennan intimates, that all states other than Oregon must now enact new obscenity statutes. Other

Indiana statutes stricken in *Mohney* and *Stroud* could have been preserved for future application by sensitive and precise construction in light of the latest doctrine in the area of obscenity.³⁸

In any case, and probably for the better, "the subject of obscenity [now] awaits the wisdom of the legislature."³⁹ Somewhat ironically, the most recent Indiana legislative session failed to produce any substitute obscenity legislation.⁴⁰ This lack, coupled with the fate of some local obscenity ordinances, has left some Indiana communities without any effective general restraints on pornography, except perhaps the Pornographic Nuisance Act which itself is of doubtful validity.⁴¹

existing state statutes, *as construed heretofore or hereafter*, may well be adequate.

Id. at 24 n.6 (emphasis added).

³⁸Some growing aversion to overbreadth analysis may be detected in such recent cases as *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973). It is noteworthy that the general run of federal obscenity legislation is couched in language as or more general than the Indiana provisions which were invalidated. *See, e.g.*, 18 U.S.C. §§ 1461, 1462, 1464 (1970); *Hamling v. United States*, 94 S. Ct. 2887 (1974).

Significantly, Justice DeBruler, who dissented to the original convictions of both *Mohney* and *Stroud*, agreed that the statutes, "read to incorporate the interpretations of the Supreme Court of the United States," were not unconstitutional on their faces. *Stroud v. State*, 257 Ind. 204, 218, 273 N.E.2d 842, 850 (1971). It may be contended that the statutes could have been reread to incorporate the latest features of obscenity doctrine and could thus have been preserved for future application.

With the Indiana statute stricken, compare a later legislative effort concerning sale of pornography to minors. IND. CODE §§ 35-30-11-1 *et seq.* (IND. ANN. STAT. §§ 10-817 *et seq.*, Burns Supp. 1974). This provision relates in some great detail its proscriptive ambit and explicitly sets forth the test found in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). While at least formally still in force, the latter statute might be less able to be saved by construction because of its very explicitness. *See, e.g.*, *Walker v. Birmingham*, 388 U.S. 307, 324 (1967) (Warren, C.J., dissenting).

³⁹*Thomas v. State*, 303 N.E.2d 293, 294 (Ind. Ct. App. 1973). *Thomas* reiterated the constitutional infirmity of IND. CODE § 35-30-10-1 (IND. ANN. STAT. § 10-2803, Burns Repl. 1956).

⁴⁰Several bills were introduced, *e.g.*, Ind. S. 106, 98th Gen. Assembly, 2d Sess. (1974), but failed to pass.

⁴¹IND. CODE §§ 35-30-10.5-1 to -10 (IND. ANN. STAT. §§ 9-2711 to -2720, Burns Supp. 1974). *See Note, Defects In Indiana's Pornographic Nuisance Act*, 49 IND. L.J. 320 (1974). For example, the Indianapolis ordinance drafted in 1973 in an effort to comply with recent obscenity standards has been enjoined by order of Judge Kuykendall. The temporary experience of surviving with no law regulating obscenity may provide the General Assembly with interesting data on the need for far-reaching regulation.

That earthy language alone is not obscene was reaffirmed by the United States Supreme Court in *Hess v. Indiana*,⁴² a case arising from a street demonstration at Indiana University in Bloomington. Hess' conviction for disorderly conduct had originally been upheld by the Indiana Supreme Court.⁴³ Police had been called to clear an estimated 200 to 300 demonstrators from the front of a campus building. When the bulk of the demonstrators blocked a patrol car, police attempted to clear the street. Sometime during this operation, a sheriff reportedly heard Hess say in a loud voice, while in a position with his back to the police and facing the bulk of the demonstrators, "We'll take the fucking street later," or "We'll take the fucking street again."⁴⁴ Hess was arrested and convicted for violation of the Indiana disorderly conduct statute.⁴⁵

Justice Givan, applying what he purported to be the clear and present danger test as reformulated in *Brandenburg v. Ohio*,⁴⁶ found that Hess' conduct surpassed the "theoretical advocacy of violence," which the justice took to be the limit of protected speech under the circumstances.⁴⁷ Justice Givan also dismissed Hess' facial challenge on the basis that the statute "can only be applied if the speech has a tendency to lead to violence,"⁴⁸ a construction which Justice Hunter, in a lengthy dissent, properly pointed out would not pass constitutional muster.⁴⁹ Justice Hunter also took issue with the majority's determination that Hess intended violence or that the situation was so volatile that violence properly could be called imminent.

In a brief per curiam opinion,⁵⁰ the United States Supreme Court found Hess' words to be neither a nuisance, nor obscene, nor, since not directed to anyone, fighting words. The Court found that, at best, the words "could be taken as counsel for present modera-

⁴²414 U.S. 105 (1973).

⁴³*Hess v. Indiana*, 297 N.E.2d 413 (Ind. 1973).

⁴⁴*Id.* at 414.

⁴⁵IND. CODE § 35-27-2-1 (IND. ANN. STAT. § 10-1510, Burns Supp. 1974) provides in pertinent part:

Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct

⁴⁶395 U.S. 444 (1969).

⁴⁷297 N.E.2d at 415.

⁴⁸*Id.* at 416.

⁴⁹*Id.* at 421.

⁵⁰Despite the per curiam mold of the majority, Chief Justice Burger and Justice Blackmun filed a dissent which took the majority to task for ignoring the finding of the lower courts that the situation was indeed highly charged.

tion" and, at worst, were "nothing more than advocacy of illegal action at some indefinite future time."⁵¹ The Supreme Court did not consider the facial validity of the statute.

Less success attended the protest efforts of the defendants in *Cunningham v. State*.⁵² These defendants were convicted for interfering with the lawful use of a public building, in this instance, a Selective Service office.⁵³ Appellants placed a rose on each desk in the office, distributed leaflets and, loudly and in unison, read the names of Indiana residents killed in Vietnam. Testimony indicated that appellants' conduct interfered with the normal service and regimen of the Selective Service office. After twice refusing requests to leave, including one request from a police officer, appellants were arrested.

The court, in rejecting appellants' first amendment challenge,⁵⁴ placed heavy reliance on the case of *Campbell v. State*,⁵⁵ wherein it was reasoned that the right of free expression is but one of a group of rights, "each of which can only be exercised to the extent that such does not encroach upon or erode the others."⁵⁶ Central to Chief Justice Arterburn's opinion, and to his reasons for distinguishing cases such as *Brown v. Louisiana*,⁵⁷ was the finding that appellants intended to, and effectively did, disrupt the normal business of the office.⁵⁸

Two Indiana loyalty provisions fell before constitutional challenges mounted in federal courts. In *Communist Party of Indiana v. Whitcomb*,⁵⁹ the United States Supreme Court struck down a law requiring political parties and candidates to file affidavits avowing that the party "does not advocate the overthrow of local, state or national government by force or violence."⁶⁰ The application of the Communist Party of Indiana for a place on the 1972 national ballot

⁵¹414 U.S. at 108.

⁵²301 N.E.2d 638 (Ind. 1973).

⁵³The statute violated was IND. CODE § 35-19-4-4 (IND. ANN. STAT. § 10-4534, Burns Supp. 1974).

⁵⁴Appellants also contended that the statute was designed only to apply to university buildings, which contention the court dismissed. Appellants' argument that the statute violated IND. CONST. art. 4, § 19, by encompassing two separate subjects, namely trespass and boisterous conduct, was likewise deemed unavailing. The court held that the statute applied only to trespass, "defined as a going upon or remaining within a public building with the intent of disrupting the work that goes on in that building." 301 N.E.2d at 640.

⁵⁵256 Ind. 630, 271 N.E.2d 463 (1971).

⁵⁶*Id.*

⁵⁷383 U.S. 131 (1966) (invalidating a conviction for a silent protest in a library).

⁵⁸*See Adderley v. Florida*, 385 U.S. 39 (1966).

⁵⁹414 U.S. 441 (1974).

⁶⁰IND. CODE § 3-1-11-12 (Burns 1972).

was rejected because it lacked the pertinent affidavit. A three judge court rejected a challenge to the provision but ordered that the Communist Party be placed on the ballot if the affidavit were filed.⁶¹ The Party accepted the invitation, but filed "a friend" in the form of an explanatory note confining "advocacy" to the limits the Party found in *Yates v. United States*.⁶² The state rejected the annotated affidavit. The three judge court, to whom the Party again turned, refused relief.⁶³

The Supreme Court, through Mr. Justice Brennan, reversed upon a finding that the challenged affidavit was facially invalid.⁶⁴ Citing *Brandenburg v. Ohio*⁶⁵ for principles deemed applicable to state regulation of ballots, the Court emphasized that advocacy, unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"⁶⁶ cannot be the subject of sanctions.⁶⁷ Therefore, the Communist Party would seem to have achieved more than it sought in its attempt to import the structure of *Yates*.

The federal district court in Indiana had little trouble disposing of the Indiana requirement that paid lobbyists submit an affidavit denying membership in the Communist Party, or any other subversive organization, and averring that the affiant had never refused to answer questions posed by a congressional committee con-

⁶¹The decision of the three judge court, dated September 28, 1972, is unreported.

⁶²354 U.S. 298 (1957). The *Yates* case, according to the Communist Party, required a finding of advocacy of "concrete action" for forcible overthrow rather than a finding of mere exposition of principles.

⁶³On September 28, 1972, the Court did, however, at the behest of the American Independent Party and the Indiana Peace and Freedom Party, as well as the Communist Party, strike down IND. CODE § 3-1-11-12 (Burns 1972), which required an affidavit denying affiliation or cooperation with foreign groups or governments. This decision was affirmed summarily in *Whitcomb v. Communist Party*, 410 U.S. 976 (1973).

⁶⁴414 U.S. at 447-48.

⁶⁵395 U.S. 444 (1969).

⁶⁶414 U.S. at 448, quoting from *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁶⁷The use of the *Brandenburg* test in this context arguably may be said to presage the extension of protection against anti-subversive oaths, affidavits and sanctions. Such regulations heretofore had seemingly been countenanced so long as they were directed to determining if the affiant was a knowing member of a subversive group and had a specific intent to further its illegal aims. So long as the group advocated imminent concrete action, that was enough. See, e.g., *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971). A logical extension of the case under consideration may be seen to add a requirement of actual imminence to the elements of knowledge and specific intent. That is, the government will have to show that the group presents an actual and imminent threat to a legitimate government interest.

cerning party membership. In *Raphael v. Conrad*,⁶⁸ the three judge court found the required affidavit overbroad insofar as it sanctioned membership in a subversive group which membership was not both knowing and partaking of a specific intent to promote the group's illegal aims.⁶⁹ While recognizing that Communist Party membership is not per se illegal, the court found that the oath violated the privilege against self-incrimination, since "testimony concerning affiliation with the Communist Party could . . . subject a witness to criminal sanctions."⁷⁰

B. Equal Protection

In *United States v. Board of School Commissioners*,⁷¹ the Indianapolis school desegregation case, the proper remedy for a pattern of de jure segregation turned out to be the least tractable aspect of the litigation. Judge Dillin's 1973 opinion⁷² noted at its outset that, since the time of his original opinion on the substantive issue of segregation, the percentage of Negro pupils in the Indianapolis public school system (IPS) had increased to over forty percent, a figure well beyond the point at which he found that white exodus from a school system accelerates, continues and becomes irreversible. Such trends and figures, coupled with "a clear preponderance of the expert opinion," led Judge Dillin to conclude that a remedy "cannot be accomplished within the present boundaries of IPS in a way that will work for any significant period of time."⁷³

The key, critical to fashioning a truly efficacious remedy, was the court's finding that authority over the schools and school affairs "resides exclusively within the dominion of the legislature and the school system is a centralized and not a localized form of school government."⁷⁴ Therefore, the de jure segregation practiced in the Indianapolis school system was found properly imputable to the

⁶⁸371 F. Supp. 256 (S.D. Ind. 1974). The invalidated statute is IND. CODE § 2-4-3-2 (Burns 1972).

⁶⁹The district court opinion relied mainly on *Cole v. Richardson*, 405 U.S. 676 (1972), and *Elfbrandt v. Russell*, 384 U.S. 11 (1966). This reliance, which seems sound, might be compared with the potential import of *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974), discussed at text accompanying notes 59-67 *supra*.

⁷⁰371 F. Supp. at 259, *citing, inter alia*, *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

⁷¹332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973). In this case, it was determined that the Indianapolis Public School system (IPS) was guilty of illegal segregation of pupils in its public schools.

⁷²368 F. Supp. 1191 (S.D. Ind. 1973).

⁷³*Id.* at 1198.

⁷⁴*Id.* at 1200.

state, of which local school corporations are but agents. In addition, the court found that the state itself had practiced de jure segregation through such omissions and acts as the approval of school sites which were found to have furthered discriminatory patterns.⁷⁵

Having found that the onus of segregation must be shared by the state, the court deemed that the remedy need no more be bounded by school districts, or even county political boundaries, than is the state's power over the general management of schools.⁷⁶ It being "the duty of the General Assembly . . . to provide, by law, for a general and uniform system of Common Schools . . . equally open to all,"⁷⁷ the court concluded that it befell that body to devise a metropolitan plan of common school education within a reasonable time, failing which the court itself would act to do so.⁷⁸ As an interim measure, the court ordered, *inter alia*, the transfer of elementary school pupils within IPS to achieve a minimum fifteen percent black enrollment at each school.⁷⁹ The subsequent failure of the Indiana General Assembly to act⁸⁰ would seem to return to the court the responsibility to see that a viable remedy is fashioned.

Judge Dillin's finding of state responsibility was appealed to the Court of Appeals for the Seventh Circuit. While that appeal

⁷⁵*Id.* at 1205.

⁷⁶The state-wide scope of the Indiana school system was a crucial factor which, the court found, distinguished the Indianapolis case from the Virginia case of *Bradley v. School Bd.*, 462 F.2d 1058 (4th Cir.), *aff'd by an equally divided Court sub nom.* *School Bd. of Educ.*, 412 U.S. 92 (1973), which denied the remedial mandate of the district court calling for a desegregation plan which ignored county boundaries. Virginia's school system, unlike Indiana's, placed primary power in local governing bodies.

The Indianapolis case generally was thought to resemble more closely *Bradley v. Milliken*, 484 F.2d 215 (6th Cir. 1973), wherein the Court of Appeals for the Sixth Circuit upheld a metropolitan desegregation plan for Detroit, Michigan. The United States Supreme Court, however, reversed. *Milliken v. Bradley*, 94 S. Ct. 3112 (1974). See discussion at text accompanying notes 81-83 *infra*.

⁷⁷IND. CONST. art. 8, § 1.

⁷⁸368 F. Supp. at 1205.

⁷⁹Other aspects of the interim relief included an order, which was stayed before becoming effective, directing transfer of IPS pupils to certain outlying metropolitan area school districts; an order to rearrange high school feeder patterns "so as to secure enrollment of Negro students in each school more nearly approaching their numbers in the system;" and an order requiring the institution of programs designed to orient the thinking of students and teachers toward solving the problem of segregation. *Id.* at 1209.

⁸⁰In an order dated December 6, 1973, Judge Dillin reemphasized the duty of the General Assembly and opined that "a reasonable time within which the General Assembly should act [would] be the end of its January, 1974 session or February 15, 1974, whichever date is sooner." *United States v. School Comm'rs*, No. IP 68-C-225 (S.D. Ind., Dec. 6, 1973). As noted in the text, there was no response from the legislators, timely or otherwise.

was pending, the United States Supreme Court decided *Milliken v. Bradley*,⁸¹ which decision undoubtedly retextures the Indianapolis case. In *Milliken*, a divided Court⁸² rejected a metropolitan remedy for segregation existing in the Detroit school system. While not upsetting the findings of the lower courts that illegal segregation, perpetrated by local and state officials, existed in the Detroit school system, the majority, speaking through Chief Justice Burger, deemed that a metropolitan remedy, encompassing school districts wherein no illegal separation of races was found to exist, was beyond the equitable powers of federal courts. The proposition that "the scope of the remedy is determined by the nature and extent of the constitutional violation,"⁸³ coupled with a record which showed that the unlawful acts of state and local officials contributed to a dual school system only in Detroit and not in the outlying school districts included in the proposed remedy, led the majority to conclude that the duty of the federal court was to cure the violation in Detroit and Detroit only. The fact that a Detroit-only plan would produce a still predominantly black school system was of no consequence to the Court, which opined that a racial balance reflecting the metropolitan population was not part of the constitutional mandate of unitary school systems. Chief Justice Burger's opinion emphasized the long tradition of local school control, a tradition found likely to suffer from the upheaval which would accompany the creation of a "super" metropolitan school district.

Certain differences between the Detroit and Indianapolis situations, however, make the effect of the *Milliken* decision less than certain. Critical to the Supreme Court's reasoning in *Milliken* was the absence of findings that any of the outlying school systems were themselves unlawfully segregated. In the Indianapolis case, however, while it is true that Judge Dillin found "no evidence that any of the added defendant school corporations have committed acts of *de jure* segregation directed against Negro students living within their respective borders,"⁸⁴ he also noted that the paucity of Negro residents in these outlying areas, coupled with the abundance of Negroes employed in these areas, suggested that

at the very least . . . Negroes have consistently been deprived of the privilege of living within the territory of the added defendants by reason of the customs and usages of the communities embraced within such boundaries, and of the State.⁸⁵

⁸¹94 S. Ct. 3112 (1974).

⁸²Justices Douglas, Brennan, White and Marshall dissented.

⁸³94 S. Ct. at 3127.

⁸⁴368 F. Supp. at 1203.

⁸⁵*Id.* at 1204-05.

While recognizing that the court was not considering a housing case, Judge Dillin remarked that "the discriminatory customs and usages mentioned have had a demonstrably causal relationship to segregation in the schools."⁸⁶

More concretely, the Supreme Court noted that the invidious drawing of school district boundaries, of which there was no proof in the Detroit case, may provide a sufficient basis for ignoring those boundaries in fashioning a remedy. Judge Dillin at least twice suggested the possibility that invidious motives played a role in the present shape of IPS, a shape for which outlying Marion County districts may have been partially a cause.⁸⁷

A figure potentially emerging as a key in the fate of the Indianapolis case is Mr. Justice Stewart, who concurred separately in the Detroit case. With characteristic caution, Mr. Justice Stewart noted that an interdistrict remedy might indeed be proper on a showing that "state officials had contributed to the separation of the races by drawing or redrawing school district lines . . . or by purposeful, racially discriminatory use of state housing or zoning laws"⁸⁸ However, because no showing was made that officials, state or local, had contributed to segregation in areas other than Detroit, "the formulation of an interdistrict remedy was . . . not responsive to the factual record before the District Court."⁸⁹

This potentially crucial difference between the Detroit and Indianapolis cases was not lost on the Court of Appeals for the Seventh Circuit. In August, 1974,⁹⁰ the court upheld Judge Dillin's finding that state officials were themselves guilty of contributing to the illegal segregation extant in IPS.⁹¹ While reversing, in accordance with *Milliken*, the district court's rulings pertaining to a metropolitan remedy beyond the confines of Uni-Gov, the court of appeals remanded the case for a determination of "whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov"⁹²

⁸⁶*Id.* at 1205.

⁸⁷*See* *United States v. Board of School Comm'rs*, 368 F. Supp. 1191, 1203 (S.D. Ind. 1973); *United States v. Board of School Comm'rs*, 332 F. Supp. 655, 675-76 (S.D. Ind. 1971).

⁸⁸94 S. Ct. at 3132.

⁸⁹*Id.* at 3133.

⁹⁰*United States v. Board of School Comm'rs*, 43 Ind. Dec. 401 (7th Cir. 1974).

⁹¹*Id.*

⁹²*Id.* The court of appeals affirmed Judge Dillin's decision on other miscellaneous matters, to wit: the institution of an interim remedy for the 1973-1974 school year following the rejection of a school board interim proposal as inadequate; the refusal of Judge Dillin to recuse himself for bias; the

In *State ex rel. Miller v. McDonald*,⁹³ the Indiana Supreme Court struck down an Evansville ordinance which limited municipal trash collection to houses and apartment complexes with four or less units. The suit, challenging the ordinance as a denial of equal protection,⁹⁴ was brought by a class of apartment owners whose properties were excluded from collection under the 1969 ordinance. While noting that the absence of any showing that the ordinance in question burdened a suspect class or affected a fundamental right meant that it would be valid upon a finding of "any rational or reasonable basis,"⁹⁵ the court, speaking through Justice Hunter, could discern no such minimal finding. The court detected two basic classifications: (1) between apartment complexes of four or less units and those of more than four units, and (2) between commercial and noncommercial enterprises. While it was obvious to the court that "the *quantity* of goods and services . . . varies with the number of units in the building," it was as clear that "the *nature* of the relationship remains the same."⁹⁶ Hence, the ordinance was found to apply "a double standard to those who, in reality, are in the same class without any reasonable justification."⁹⁷ Especially irrational was the unequal application of the ordinance between hotels which, because they generated "household refuse" as defined, would seem to be eligible for trash collection, and huge complexes which, while generating identical refuse, would not be eligible.⁹⁸ Chief Justice Arterburn dissented without opinion.

addition of parties pending appeal; the rejection of state officials' eleventh amendment challenge; the determination that the finding of illegal segregation in IPS was *res judicata* so as to prevent added defendants from relitigating the issue; the lack of necessity for a three judge court; the exclusion of certain scientific evidence; and the award of attorneys' fees to certain plaintiffs. *Id.* at 416-25.

⁹³297 N.E.2d 826 (Ind. 1973).

⁹⁴Relief was sought on the basis of the fourteenth amendment and IND. CONST. art. 1, § 23, which provisions were, for the purposes of this case, deemed to be synonymous.

⁹⁵297 N.E.2d at 829.

⁹⁶*Id.* at 830.

⁹⁷*Id.*

⁹⁸The Indiana Supreme Court's standard of "base rationality" seems somewhat higher than that of the United States Supreme Court in, for example, *Railway Express Agency v. New York*, 336 U.S. 106 (1949). In *Railway Express*, the Court upheld a New York City ordinance prohibiting signs upon vehicles unless touting the vehicle owner's wares. Mr. Justice Douglas imagined that perhaps those "who advertised their own wares . . . do not present the same traffic problem," *id.* at 110, and Mr. Justice Jackson supposed the state may well prefer the owner to the hireling. *Id.* at 115. An equal tolerance might conjecture that Evansville reasonably prefers a lack of concentration of people, and of garbage—except in hotels.

In *Sturrrup v. Mahan*⁹⁹ the Indiana Supreme Court was presented with the equal protection challenge of a high school student who was excluded from participating in interscholastic athletics through the application of an Indiana High School Athletic Association (IHSAA) rule. This rule prohibited a student's participation in any inter-school contest "until he has been enrolled in such school for one calendar year, unless the parents of such student actually change their residence to the second school district."¹⁰⁰

Plaintiff had been living in Florida with his family. His mother was sick and he and ten sisters were crowded into a two bedroom house. His friends and fellow athletes were using drugs. Because of this "demoralizing" atmosphere, plaintiff moved to Bloomington to live with his brother.¹⁰¹ The Indiana Court of Appeals granted the plaintiff relief upon the basis that the IHSAA rules had unconstitutionally burdened his fundamental right to travel.¹⁰² While agreeing that plaintiff was entitled to relief, the Indiana Supreme Court considered the lower court's analysis faulty. Unlike the provisions involved in *Dunn v. Blumstein*¹⁰³ or *Shapiro v. Thompson*,¹⁰⁴ cases upon which the court of appeals mainly relied, the supreme court found that the IHSAA rules under attack treated alike all transferees, whether intrastate or interstate. Hence no special burden was found to fall upon persons, such as plaintiff, exercising their right to travel.¹⁰⁵

⁹⁹305 N.E.2d 877 (Ind. 1974).

¹⁰⁰IHSAA Rule 12, § 1, as set out at 305 N.E.2d at 878. Although on its face the rule would seem to apply only to transfers from member schools, this rule had consistently been construed to apply to persons transferring from outside the state. *Id.* at 878 n.2. Another relevant provision, IHSAA Rule 22, § 6, provides that a student who must, because of unavoidable circumstances, transfer without coming within the provision of section 1, may be declared eligible upon "proof that the change was necessary and that no undue influence was attached to the case in any way." 305 N.E.2d at 879.

¹⁰¹In his dissent, Chief Justice Arterburn questioned the purity of plaintiff's motives in changing his residence, noting that his brother had stated in a letter that, if he had known plaintiff would be barred from athletics, he "would have sent him home where he could have played with [no] difficulties what so ever." 305 N.E.2d at 882.

¹⁰²*Sturrrup v. Mahan*, 290 N.E.2d 64, 74 (Ind. Ct. App. 1973).

¹⁰³405 U.S. 330 (1972).

¹⁰⁴394 U.S. 618 (1969).

¹⁰⁵The analysis of the court of appeals would seem to have received substantial support in a case reported one month after the Indiana Supreme Court opinion. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974). The Court, per Mr. Justice Marshall, upheld a challenge to an Arizona statute requiring a one year residency in a county as a condition to receiving free non-emergency hospitalization or medical care. The state had contended, *inter alia*, that the provision was valid because it penalized intrastate and not interstate travel. Mr. Justice Marshall responded:

Nevertheless, the regulation under attack was found to be fatally defective. The first flaw, as described by Justice Hunter, lay in the fact that the rules limited

eligibility to those who move with their parents free of undue influence and to those whose move is necessitated by "unavoidable circumstances" free of undue influence. All other transferring student-athletes, who cannot bring themselves within one of the above two categories, are *automatically* denied the opportunity to participate in interscholastic athletics for a period of one year. The by-laws, in essence, create an irrebuttable presumption that all other transferees have been victims of unscrupulous practices. This is precisely where the rules sweep too broadly, they create an over-inclusive class—those who move from one school to another for reasons wholly unrelated to athletics are grouped together with those who have "jumped" for athletic reasons. . . . The rules as presently constituted penalize a student athlete who wishes to transfer for academic or religious reasons or for any number of other legitimate reasons.¹⁰⁶

Thus, the means chosen to further the otherwise legitimate state purpose of preventing school "jumping" for athletic reasons were deemed too imprecise.¹⁰⁷

Even were we to draw a constitutional distinction between interstate and intrastate travel, a question we do not now consider, such a distinction would not support the judgment of the Arizona court in the case before us. Appellant . . . has been effectively penalized for his interstate migration

Id. at 255-56. The situation of the plaintiff in *Sturrup* seems comparable.

¹⁰⁶305 N.E.2d at 881.

¹⁰⁷The court's opinion does not explain adequately the precise grounds for its holding. If the problem is one of a denial of equal protection, it is not clear what factor triggered the rather strict scrutiny applied. No suspect class appeared. The only possible fundamental right involved, the right to travel, had not, by the court's lights, been burdened. The phrase "irrebuttable presumption" suggests the court was following cases, such as *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), which invalidated certain irrebuttable presumptions applied to the employment of pregnant teachers, and *Vlandis v. Kline*, 412 U.S. 441 (1973), in which the Court held that the due process clause forbids a state to deny an individual college student resident tuition rates on the basis of the "permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." *Id.* at 452. *See also Stanley v. Illinois*, 405 U.S. 645 (1972). If this type of due process analysis is the basis for the court's holding, it might have been helpful for the court to have engaged in a discussion of the matters suggested by *Vlandis*, for example, the availability of alternative means, the extent to which an

The second imperfection noted by the court derived from the fact that, although plaintiff's brother had been appointed guardian by the Circuit Court of Monroe County and therefore stood in loco parentis to plaintiff, a relationship explicitly recognized by IHSA by-laws as tantamount to parentage, the state officials still demanded a showing of unavoidable change of residence.¹⁰⁸ Such an attitude was characterized by the court as "patently arbitrary and capricious."¹⁰⁹

*Taylor v. State*¹¹⁰ presented a challenge to the use of an eligible voters list for the selection of the jury array in Daviess County. Defendant's appeal from his second degree murder conviction was premised on the fact that an eligible voters list would not include some two thousand Amish residents who did not register to vote. The court, through Justice Givan, held the selection process valid. In the first place, the court noted, the defendant had not shown that he was of the Amish faith or that the Amish were systematically excluded from jury service.¹¹¹ In the absence of a showing of purposeful exclusion, and in the face of what seemed a practical method of drawing a reasonable cross section of the community, the court held the selection process acceptable.

Justice DeBruler's dissent emphasized the "affirmative duty" of jury commissioners "to compile and use a list which does indeed represent a cross section of the community."¹¹² Defendant's showing that the Amish constituted eight percent of the adult population of Daviess County convinced Justice DeBruler that a "prima facie case of constitutional violations"¹¹³ had been made out, thus requiring the state to shoulder the burden of rebutting the "presumption of unconstitutionality."¹¹⁴

"irrebuttable presumption" in fact exists, and the importance of the interest invaded given that *Vlandis* concerned travel, *LaFleur* concerned livelihood and procreation, and *Stanley* concerned sex and parentage. The IHSA rule in question does provide room for proof of "no undue influence." The proper reading of that term, and of the "unavoidable circumstances" prompting the change, would seem critical to the question of whether the presumption is truly irrebuttable.

¹⁰⁸305 N.E.2d at 882.

¹⁰⁹*Id.*

¹¹⁰295 N.E.2d 602 (Ind. 1973). Cf. *Lake v. State*, 274 N.E.2d 249 (Ind. 1971); *State ex rel. Brune v. Vanderburgh Circuit Court*, 265 N.E.2d 524 (Ind. 1971) (concerning the use of property tax lists as a source of jurors).

¹¹¹In fact, it appeared that five percent of the Amish population was registered to vote. 295 N.E.2d at 605.

¹¹²*Id.* at 611.

¹¹³*Id.*

¹¹⁴*Id.* citing, *inter alia*, *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Jones v. Georgia*, 389 U.S. 24 (1967). Justice DeBruler also deemed defendant's standing unaffected by his lack of Amish affiliation. 295 N.E.2d at 611.

Practically, of course, there seems little to suggest that the state was purposefully discriminating in its selection process. Therefore, the state might be placed in a quandary as to what order of proof Justice DeBruler would have it bring forth. It might have been more advantageous to have suggested that statistical disparity affecting an identifiable religious group demands that the state show something more, such as a necessity for confining jury panels to registered voters. Viewed in this manner, the problem can be seen to provoke a more subtle inquiry into the reach of equal protection doctrine than is present in cases in which a charge of purposeful discrimination exists.¹¹⁵

C. Due Process

In *Brooks v. Center Township*,¹¹⁶ the Court of Appeals for the Seventh Circuit found defendant's act of terminating rent and food assistance without notice, hearing or notice of appeal rights to be wanting in due process under the standards of *Goldberg v. Kelly*.¹¹⁷ The class action had been dismissed by the federal district court upon a finding that plaintiffs had failed to exhaust available state post-termination remedies. The state remedies available, to which the district court would have relegated plaintiffs, provided for a review and hearing by the Board of County Commissioners of the termination decision of the township overseer.¹¹⁸ As the court of appeals pointed out, however, plaintiffs' grievance was not with the express provision of the statute but with its failure and the failure of any other statute "to provide due process at the level of the initial termination of relief."¹¹⁹ Therefore, the administrative procedures to which plain-

There is substantial difficulty in measuring what kind of showing is sufficient to raise a presumption of discriminatory selection of jurors. However, it should be noted that the cases cited by Justice DeBruler present a somewhat more vivid portrait of discriminatory selection processes than was present in the instant case. For example, *Alexander* portrayed a selection system which, in a county containing a Negro population of over twenty-one percent, resulted in a venire of which only six and three quarters percent were Negro. Moreover, the selection process, which was conducted by an all white panel, involved racial identification at all critical stages. This factor, coupled with the statistical deviation of the panel composition from the likely result of a truly random process, prompted the Court to lay the burden of disproving impropriety upon the state. See also *Whitus v. Georgia*, 385 U.S. 545 (1967).

¹¹⁵See, e.g., *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Palmer v. Thompson*, 403 U.S. 217 (1971).

¹¹⁶485 F.2d 383 (7th Cir. 1973).

¹¹⁷397 U.S. 254 (1970).

¹¹⁸IND. CODE § 12-2-1-18 (Burns 1973).

¹¹⁹485 F.2d at 385.

tiffs had been consigned by the district court were part and parcel of the system, or lack thereof, under attack.

Moreover, the court of appeals noted the modern Supreme Court trend to find that the section 1983¹²⁰ civil rights remedy "is supplementary to any state administrative remedies and that federal jurisdiction may be invoked without exhaustion of state remedies."¹²¹ The invocation of federal power was found to be all the more justifiable when no state proceedings were pending with which a federal court order might interfere and when the claimants would be under a substantial burden if required to resort to available state remedies.

Less hospitality was afforded an elementary school teacher who sought federal relief when the local school board, by whom she had been employed for three years, failed to renew her contract. In *Jeffries v. Turkey Run Consolidated School District*,¹²² Judge Stevens characterized plaintiff's claim as one premised neither on allegations that she had been denied elements of procedural fairness¹²³ nor on allegations that tenure or some other special entitlement had been ignored, but rather on a claim that the reasons for the nonrenewal were arbitrary and capricious and, hence, a denial of substantive due process.

The court deemed itself bound by the holding of *Board of Regents v. Roth*,¹²⁴ in which respondent, a political science professor on a ten month contract, was found not entitled to a due process hearing when petitioners failed to renew his contract. The thesis of the *Roth* case, that due process protects only liberty and property, was found to apply with at least equal force to Mrs. Jeffries' dilemma. Because she made no claims of any specific entitlement, beyond desire and personal expectation, and because the reasons for her dismissal¹²⁵ did not appear to the court to amount to a special stigma or deprivation of the ability to practice her art in the future, she could therefore show no property or liberty interests entitled to protection.

¹²⁰42 U.S.C. § 1983 (1970).

¹²¹485 F.2d at 386. See, e.g., *Allee v. Medrano*, 94 S. Ct. 2191 (1974); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963).

¹²²492 F.2d 1 (7th Cir. 1974).

¹²³She was, in fact, given written notice of the reasons for dismissal and a hearing at which she was represented by counsel.

¹²⁴408 U.S. 564 (1972).

¹²⁵The school board's statement did suggest that "Mrs. Jeffries exhibited highly unethical conduct," apparently by openly contradicting the directives of other teachers. This was said to have disrupted the school. As well, she was described as uncooperative in regard to the school's music program. 492 F.2d at 2 n.1.

A somewhat similar, although more problematic model, surfaced in *Indiana State Employees Association, Inc. v. Negley*.¹²⁶ Here, the plaintiffs, formerly employees of the Indiana Department of Public Instruction, claimed their discharges were caused by their political affiliations.¹²⁷ Hence, plaintiffs claimed that they had been denied equal protection and due process and that their rights of free association had been impermissibly trampled. The court denied relief¹²⁸ and noted that none of the plaintiffs "were within Indiana's statutory merit system, and each served at the pleasure of the Superintendent of Public Instruction."¹²⁹ The political patronage system, of which plaintiffs were victims, was considered by the court to be "a matter for executive and legislative rather than judicial reform."¹³⁰

The greater portion of Judge Noland's opinion is devoted to a description of plaintiffs' duties as partaking of policy-making discretion, a characterization presumably gaining import from the case of *Illinois State Employees Union v. Lewis*.¹³¹ The *Lewis* decision involved a challenge to the Illinois brand of political patronage which resulted in the discharge of several employees of the Secretary of State's office. While the court of appeals had harsh words for aspects of the political patronage system, the opinion purports to be confined to the question of the dismissal of non-policy-making employees.¹³² Without exception, Judge Noland found plaintiffs to occupy policy-making positions. Hence, the court suggested that it "need not . . . determine whether the dismissals were politically motivated."¹³³ The court concluded that, at least for employees situated similarly to these plaintiffs, discharges need not be politically neutral. Considerations of loyalty, efficiency and political responsiveness, which are intertwined with party affiliation, were noted by the court as interests weighing in favor of making party affiliation a proper ground for employment.

It seems undeniable that, at some levels, public officials' employment may be made dependent upon party affiliation. At the same time, it has become clear that government may not in general deny benefits, such as employment, on an unconstitutional

¹²⁶365 F. Supp. 225 (S.D. Ind. 1973).

¹²⁷Plaintiffs were described as Democrats and Independents. Defendant, the State Superintendent of Public Instruction, was a Republican.

¹²⁸Plaintiffs had also sought relief under IND. CONST. art. 1, §§ 9, 12, 23.

¹²⁹365 F. Supp. at 227.

¹³⁰*Id.* at 233.

¹³¹473 F.2d 561 (7th Cir. 1972).

¹³²*Id.* at 566. The court also noted that plaintiffs "properly do not challenge the public executive's right to use political philosophy or affiliation as one criterion in the selection of policy-making officials." *Id.* at 574.

¹³³365 F. Supp. at 232.

basis. Thus, "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."¹³⁴ The problem facing Judge Noland has not yet been favored with authoritative principles delineating the line between employees whose jobs are properly at the mercy of politics and those whose jobs are not. A distinction drawn upon the existence vel non of some protected "property" interest, implicit in some recent cases,¹³⁵ may be sufficient for determining the right to a due process hearing, but is not necessarily appropriate for a case in which the government benefit expressly has been removed because of political association.

In *Pulos v. James*,¹³⁶ the Indiana Supreme Court struck down an Indiana statute which empowered the metropolitan planning commissions in counties with first class cities to vacate covenants or restrictions applicable to plats.¹³⁷ The cases which gave rise to the *Pulos* decision arose from the vacation by the Metropolitan Plan Commission of Marion County of restrictive covenants which prohibited commercial buildings in the plat where plaintiffs owned property. Defendants, owners of two lots in the same plat, had petitioned the plat committee of the plan commission to vacate the restrictive covenants, at least with regard to their two lots. The court cautioned at the outset that it was concerned, not with the considerations which warrant an equity court's refusal to enforce restrictive covenants, but only with the constitutionality of that portion of the statute which purportedly vests in the plain commission the authority to vacate subdivision restrictions.¹³⁸ With that parallax, the court deemed that the vacation of such restrictive covenants constituted the taking of private property for private use,¹³⁹ a taking prohibited by the Indiana and United States Constitutions.¹⁴⁰ The court concluded by observing that, even if the taking could have been considered to be for the public's benefit, it would

¹³⁴*Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

¹³⁵*E.g.*, *Perry v. Sinderman*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

¹³⁶302 N.E.2d 768 (Ind. 1973).

¹³⁷IND. CODE § 18-5-10-41 (IND. ANN. STAT. § 48-916, Burns Supp. 1974).

¹³⁸302 N.E.2d at 771.

¹³⁹The court concluded that a restrictive covenant is a protected property right. *Id.* at 774.

¹⁴⁰U.S. CONST. amend. XIV; IND. CONST. art. 1, §§ 21, 23. The court also noted that even the issuance of a zoning variance in violation of a restrictive covenant, while not in itself invalid, did not relieve property owners of their obligations, *inter se*, deriving from the covenants. See *Suess v. Vogelgesang*, 281 N.E.2d 536 (Ind. Ct. App. 1972).

still have been invalid since no provision was made for compensation.

Two final cases presented the courts with constitutional issues during the survey period. In *Livingston v. Lukasik*,¹⁴¹ the federal district court found two Indiana statutes¹⁴² concerning the imposition of imprisonment in place of fines to be wanting under the strictures of *Tate v. Short*.¹⁴³ The court granted summary judgment for plaintiff on both issues.¹⁴⁴ In *Poling v. State*,¹⁴⁵ the Indiana Court of Appeals upheld the trial court's refusal to stay suspension of a driver's license while an appeal was pending for conviction for driving under the influence of liquor and for public intoxication.¹⁴⁶

VI. Contracts and Commercial Law

*Gerald L. Bepko**

The following is a cursory review of some of the year's most significant developments in Indiana contracts and commercial law. Because of the nature of the review, there are minimal efforts at

¹⁴¹40 Ind. Dec. 544 (N.D. Ind. 1974).

¹⁴²The statutes involved were ch. 280, §§ 1, 2, [1961] Ind. Acts 654 (repealed 1974); IND. CODE § 35-1-46-1 (IND. ANN. STAT. § 9-2228, Burns Repl. 1956). The former, held to be facially unconstitutional, provided for the imprisonment of a person adjudged guilty and punished by fine until "such fine is paid or replevied." This provision was subsequently repealed by the General Assembly. Ind. Pub. L. No. 147, § 2 (Feb. 19, 1974). The latter provision, held invalid as applied to indigents, provided that persons imprisoned for failure to pay a fine may "serve" their fine at the rate of five dollars for one day. Cf. IND. CODE § 35-4.1-4-16(a) (IND. ANN. STAT. § 9-1828a, Burns Supp. 1974), *as added by* Ind. Pub. L. No. 147, § 2 (Feb. 19, 1974). The new act provides that an indigent cannot be incarcerated for failure to pay a fine, but that one who is not an indigent may be incarcerated if he either refuses or fails to pay. The reason for his failure would seem to be significant.

¹⁴³401 U.S. 395 (1971). This case nullified a Texas system which required the incarceration of persons unable to pay traffic fines. The system, which allowed a credit of five dollars for each day of incarceration, was held to be a denial of equal protection.

¹⁴⁴The court, however, refused further relief requested by plaintiff, which relief would have required defendant to mail copies of the decision to all Indiana Justices of the Peace and would have required the Attorney General to issue an opinion acknowledging the force of the decision, as being an unnecessary and unwarranted violation of principles of federalism.

¹⁴⁵295 N.E.2d 635 (Ind. Ct. App. 1973).

¹⁴⁶License suspension in such circumstances is authorized by IND. CODE § 9-2-1-5 (Burns 1973).

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analysis and some precision may have been sacrificed to the goal of brevity.

A. Judicial Developments

1. Relief for Contract Breach

The Indiana Supreme Court, in *Skendzel v. Marshall*,¹ rendered a decision that should be a landmark on the subject of relief for contract breach. The case involved the conditional land sale contract, a commonly used device for securing a vendee's obligation in a long term land sale arrangement.² In the event of default by the vendee, the vendor is typically permitted by the terms of the land sale contract to treat the contract as terminated, keep all payments as liquidated damages, and retake possession.³ It was this feature of the land sale contract with which the Indiana Supreme Court dealt.

The hardship imposed on the vendee by enforcement of this vendor's remedial or forfeiture provision is, at least, twofold. First, the amount paid by the vendee prior to default could be disproportionately large when compared to the benefit derived from the temporary use of the property. Secondly, and perhaps more important, the vendee, under this clause, has no right of redemption. If there has been an increase in the value of the property during the contract period, the defaulting vendee will not realize the increment.

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The author wishes to extend his appreciation to Robert L. Bauman for his assistance in the preparation of this discussion.

¹301 N.E.2d 641 (Ind. 1973). The result in this case was anticipated in Townsend, *Secured Transactions and Creditors' Rights*, 1973 *Survey of Indiana Law*, 7 IND. L. REV. 226, 231 (1973).

²In a conditional land sale, the vendee takes possession and a conditional right to obtain title after full payment. The vendor retains title during the contract period and has an obligation to convey title after the vendee has fully performed.

³The contract in *Skendzel* provided that:

It is further agreed that if any default shall be made in the payment of said purchase price or any of the covenants and/or conditions herein provided, and if any such default shall continue for 30 days, then, after the lapse of said 30 days' period, *all moneys and payments previously paid shall, at the option of the Vendor, without notice or demand, be and become forfeited and be taken and retained by the Vendor as liquidated damages* and thereupon this contract shall terminate and be of no further force or effect

301 N.E.2d at 643 (emphasis supplied by the court).

These hardships have prompted judicial decisions⁴ and statutes⁵ in other states protecting vendees from the harshness of this forfeiture provision. In Indiana, the courts have developed at least one method of avoiding enforcement of the provision; they have held that by accepting late payments without objection the vendor waives the right to seek forfeiture for subsequent late payments.⁶ However, until the *Skendzel* case, the Indiana courts had continued to accept the premise that the vendor could enforce the forfeiture provision.⁷

The Indiana Supreme Court took the opportunity presented by the *Skendzel* case to deal directly with the provision. After the trial court and court of appeals had disagreed over whether the vendor had waived the right to enforce the forfeiture provision, the supreme court granted transfer. The court took a wholly different tack⁸ and held that the land sale contract was to be treated as a mortgage with all accompanying incidents, such as the vendee's right of redemption. The court said that, in this case, the forfeiture provision was unenforceable because it constituted a penalty and was unconscionable.⁹ The case was remanded to the trial court with instructions to enter judgment of foreclosure on the vendor's lien.

⁴California, Connecticut and Utah apparently have protected the vendee by judicial decision. See G. OSBORNE, HANDBOOK OF THE LAW OF MORTGAGES 30 (1970).

⁵*E.g.*, MD. ANN. CODE art. 21, §§ 110-16 (1957). See G. OSBORNE, *supra* note 4, at 30.

⁶*Carr v. Troutman*, 125 Ind. App. 151, 123 N.E.2d 243 (1954). In the course of the *Skendzel* litigation, this waiver doctrine was mentioned by both the Indiana Court of Appeals, *Skendzel v. Marshall*, 289 N.E.2d 768, 771-72 (Ind. Ct. App. 1972), and the Indiana Supreme Court, *Skendzel v. Marshall*, 301 N.E.2d 641, 644 (Ind. 1973). The court of appeals found that there was no waiver because prepayments had put the vendor in a position in which he did not have to consider the vendee's delinquency a default and because, at the time of the alleged waiver, the vendor's interests were being managed by one of the vendees, as executrix. The supreme court did not resolve the waiver question.

⁷See Townsend, *supra* note 1, at 231.

⁸The vendors filed a petition for certiorari to challenge the constitutionality of the scope of the appellate review by the Indiana Supreme Court. The petition was denied. *Skendzel v. Marshall*, 94 S. Ct. 1421 (1974).

⁹The circumstances were that, in December, 1958, the vendee, Marshall, agreed to purchase the real estate for \$36,000 to be paid in the following manner: \$500 at the time the agreement was consummated, \$500 on or before December 25, 1958, and \$2,500 or more on or before January 15 of each year beginning January 15, 1960. Although the pattern of payments was somewhat irregular, Marshall had paid \$21,000 as of February 25, 1965, when payments were terminated. This included prepayments which, if counted as regular payments, would have caused Marshall to be paid up through January 15, 1968. 301 N.E.2d at 644.

Although the *Skendzel* case will undoubtedly have a significant impact on existing conditional land sale arrangements, the court offered some solace to contract vendors. First, the court stated that there are some cases in which the forfeiture provision should be enforced notwithstanding the ruling in *Skendzel*. The court took special note of those cases in which the vendee has abandoned the property, has absconded, or has made only minimal payments and thus has very little "equity" in the property.¹⁰ In those cases, the need for relief from the forfeiture provision was not considered imperative. Secondly, in a concurring opinion,¹¹ Justice Prentice urged that vendors, such as *Skendzel*, be given the benefit of provisions which would probably have been incorporated in a note and mortgage if the parties had originally dealt on that basis. These benefits would include provisions for increased interest during periods of default, acceleration of the due date upon default, attorneys' fees and expenses of foreclosure, and waiver of relief from valuation and appraisal laws.

Since the decision in the *Skendzel* case, one Indiana court has utilized an exception to the principle set forth in the supreme court's opinion. In *Goff v. Graham*,¹² the vendee in a conditional land sale contract paid a down payment of \$1,950 and one monthly payment of \$562.62 on a contract price of \$61,750 payable over twenty years. Thereafter, the vendee defaulted by failing to make installment payments, failing to pay insurance premiums, and committing some acts of waste. The vendor filed suit and the trial court entered a judgment which apparently had the effect of enforcing the forfeiture provision. The court of appeals affirmed, holding that the small amount paid by the vendee, plus the indications of the vendee's waste and deliberate neglect of the property, justified the trial court's decision.

A feature of the *Goff* case which may be of as much interest as the enforcement of the forfeiture provision is the rationale used by the court of appeals in affirming the trial court's monetary award. The trial court awarded the vendor \$4,186 composed of \$1,686 in unpaid contract payments up to the date on which a receiver was appointed and \$2,500 for waste and neglect. The court of appeals recognized that "the evidence was sufficient to show

¹⁰*Id.* at 650.

¹¹*Id.* at 651.

¹²306 N.E.2d 758 (Ind. Ct. App. 1974). In another case decided since *Skendzel*, *Tidd v. Stauffer*, 308 N.E.2d 415 (Ind. Ct. App. 1974), the court of appeals followed *Skendzel*, reversed a trial court decision enforcing the forfeiture provision, and remanded with instructions to enter a judgment of foreclosure. *Id.* at 420. In the *Tidd* case, the vendee had paid more than \$16,000 of a \$39,000 purchase price.

that these damages for waste and neglect existed," but found that "there was no evidence from which the trial court could fix a compensatory amount attributable to such damages."¹³ Despite this lack of support in the record, the court affirmed the total award on the ground that it could be sustained on another theory—restitution. Although it is not entirely clear in what manner the court was using the restitution theory, it is clear that the court intended to use the principle that the non-breaching party may sue for the value of benefits conferred on the breaching party.¹⁴ There are, however, some limitations on this right. The non-breaching party may not seek this restitution measure of recovery and at the same time seek liquidated damages for the same loss. In addition, the party seeking restitution must return any consideration received in exchange for his own performance.¹⁵ In *Goff*, the court seemed to ignore one of these qualifications. The agreement in the *Goff* case had a standard forfeiture provision which said that in the event of vendee's default the vendor was entitled "to retain all amounts theretofore paid by the Purchaser as agreed payment for the Purchaser's possession of the Real Estate prior to default."¹⁶ If the court were enforcing this provision, it would seem to be improper to also give the vendor a right to recover for benefits conferred under the contract, in this case, the use of the property. The court may, however, have viewed its decision as an application of the restitution principle in gross¹⁷ and not as an enforcement of the liquidated damages clause. However, on this view of the case, the plaintiff would have had to restore any consideration received in exchange for his performance and the court did not appear to make such a deduction.¹⁸ On either view of the case, the court appears to have suggested a new application of restitution theory.

¹³306 N.E.2d at 767.

¹⁴The court cited RESTATEMENT OF CONTRACTS § 347 (1932) which states that for total breach of contract, "the injured party can get judgment for the reasonable value of a performance rendered by him . . . if the performance . . . was (a) a part or all of a performance for which the defendant bargained"

¹⁵*Id.* § 349.

¹⁶306 N.E.2d at 761.

¹⁷This reference is to the principle contained in RESTATEMENT OF CONTRACTS § 347 (1932).

¹⁸The vendee had use of the property for three months during which he collected \$6,350 in rent and the vendee had paid \$2,512.62 on the contract price. The difference would be \$3,837.38, not \$4,186.00. In addition, even if the court used the rent received by the vendee as a measure of benefit conferred, some reduction in that amount would be appropriate to account for the efforts of the vendee in securing the rents. *See* Grissom v. Moran, 292 N.E.2d 627, 629 (Ind. Ct. App. 1973), which the court cited with approval at 306 N.E.2d at 767.

There was one other noteworthy case decided during the year on the subject of relief for breach of contract. In *Polish Roman Catholic Union v. Stanish*,¹⁹ the Court of Appeals for the Seventh Circuit had occasion to discuss the measure of recovery for breach of an agreement to loan money. The historic measure of recovery in Indiana for breach of an agreement to loan money was the difference between the interest rate in the breached loan agreement and the market rate of interest, and no recovery was permitted for consequential losses.²⁰ This rule has been applied despite the inability of a borrower to secure the loan elsewhere.²¹ This application proceeds on the assumption that money is always available in the market and, if the borrower is unable to obtain a substitute loan, it is because of his impecunious condition and not because of the lender's breach. Erosion of this rule in Indiana prior to the decision in *Polish Roman Catholic Union* had taken place on two fronts. First, the Indiana courts had apparently developed an exception to this rule in those cases in which notice of the lender's breach did not reach the borrower in time to arrange a substitute loan.²² Secondly, there was dicta in an Indiana Court of Appeals decision which said that the measure of recovery should be the same as it is in all other cases of contract breach.²³ Based on these cases, the Court of Appeals for the Seventh Circuit held that Indiana law permitted the plaintiff to recover for consequential losses when a substitute loan could not be secured.²⁴

¹⁹484 F.2d 713 (7th Cir. 1973).

²⁰*Lowe v. Turpie*, 147 Ind. 652, 49 N.E. 25 (1897).

²¹*Id.*

²²484 F.2d at 724, citing *Lowe v. Turpie*, 147 Ind. 652, 49 N.E. 25 (1897).

²³*Doddridge v. American Trust & Savings Bank*, 98 Ind. App. 334, 189 N.E. 165 (1934). It should also be noted that, in *Traylor v. Lafayette Nat'l Bank*, 303 N.E.2d 672 (1973), discussed at notes 25-28 *infra*, the court of appeals assumed without discussion that consequential damages may be recovered in a suit for breach of an agreement to loan money.

²⁴However, the court held that two of the three items of consequential damages awarded by the district court either were not "reasonably foreseeable" or were too speculative. The district court had entered a \$707,000 judgment for the plaintiff which was composed of: (1) \$400,000, the profit which the court found that the plaintiff would have realized on the sale of a completed apartment house complex which he was to build with the loaned money, (2) \$280,000, the profit which the plaintiff would have realized on the sale of four adjoining parcels of land after the complex was completed, and (3) \$27,000, the amount by which the plaintiff's indebtedness to the defendant on other loans exceeded the value of property mortgaged in favor of the defendant. The \$400,000, which represented the estimated profit which Stanish would have realized on the sale of the completed building, was computed on the basis of a projection of rental income. The court said that this projection involved too many uncertainties to be the basis for damages in a contract action. The \$280,000, which represented the profit Stanish would

2. *Parol Evidence Rule*

In *Traylor v. Lafayette National Bank*,²⁵ the court of appeals was presented with a novel question concerning the parol evidence rule. The litigation began with a suit by a lender against a borrower on a note and security agreement. The borrower counterclaimed against the lender alleging breach of an oral agreement to loan further funds. This oral agreement was made while the parties were negotiating the obligation evidenced by the note and security agreement. Some of the proof offered in support of the counterclaim apparently tended to show that the borrower had only a conditional obligation on the note. The trial court excluded this proof on the ground that it contradicted a written integration (the note and security agreement) and was inadmissible according to the parol evidence rule. The court of appeals reversed and remanded for a new trial on the counterclaim. After noting that the borrower admitted being in default on the note, the court held that the agreement to loan additional funds was a separate and distinct oral agreement which would not, if proved, contradict or vary the terms of the note and security agreement.

Some difficulty in applying the parol evidence rule has been caused by the different purposes often served by it²⁶ and the different philosophies undergirding it.²⁷ On any view of the rule, however, the court was correct in its decision in the *Traylor* case. So long as the borrower was only claiming breach of an agreement to make additional loans, the written note should not have prevented him from introducing proof of his claim. This is true even if some of that proof tended to show that the agreement to loan additional funds made the borrower's obligation on the note conditional. Also, if the borrower had been using this proof in his defense in the suit on the note by showing that the oral agreement eliminated, under some circumstances, his obligation on the note, the evidence may still have been admissible. There is authority for permitting a party to prove that a writing is not to have effect until a certain condition comes into existence.²⁸

have made on the sale of the four other parcels, was set aside on similar grounds.

²⁵303 N.E.2d 672 (1973).

²⁶Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036, 1050 (1968).

²⁷Calamari & Perillo, *A Plea for a Uniform Parol Evidence Rule*, 42 IND. L.J. 333 (1967).

²⁸*Russell v. Gift*, 90 Ind. App. 106, 167 N.E. 546 (1929); RESTATEMENT (SECOND) OF CONTRACTS § 240(d) (Tent. Drafts Nos. 1-7, 1973).

3. Interpretation of Contracts

In *Fort Wayne Bank Building v. Bank Building & Equipment Corp.*,²⁹ the court of appeals was presented with a problem similar to the problems involved in applying the parol evidence rule. The court employed a somewhat rigid emphasis in affirming the trial court's decision as to the meaning to be given language in a written agreement. The parties had disagreed as to whether language in a written agreement required an owner to indemnify a general contractor for all subcontractor claims or for only those claims which were based on work ordered directly by the owner. The trial court interpreted the contract provision to require the owner to indemnify the contractor for all subcontractor claims and entered a judgment against the owner on a third party complaint. The court of appeals affirmed on the ground that the meaning given the provision by the trial court was supported by the record. In reaching this decision, the court emphasized that a writing which is unambiguous on its face must be interpreted without the aid of evidence of extrinsic circumstances. The court stated that the agreement speaks for itself and is "not glossed by any evidence of the circumstances and motives surrounding the transaction."³⁰ Although the result in this case seems sound, the emphasis may be unduly restrictive. It is often essential in ascertaining the intent of the parties, as expressed in a writing, to know the circumstances surrounding the transaction.³¹

4. Assignment

In an interesting case, *Ertel v. Radio Corp. of America*,³² the Indiana Supreme Court resolved two questions on the subject of assignment. The circumstances which led to the litigation in *Ertel* are somewhat complicated but must be summarized to explain the issues. Radio Corporation of America (RCA) purchased three machines on an open account from Delta Engineering Corporation (Delta). These purchases were made by standard form sales agreements on three separate occasions. At the same time, Delta borrowed funds from Economy Finance Corporation (Economy) and gave a security interest in revolving inventory and accounts receivable as collateral. The security interest in the accounts receivable was created by assignment from Delta to Economy. Economy sent

²⁹309 N.E.2d 464 (Ind. Ct. App. 1974).

³⁰*Id.* at 468.

³¹See RESTATEMENT (SECOND) OF CONTRACTS § 228 (Tent. Drafts Nos. 1-7, 1973).

³²307 N.E.2d 471 (Ind. 1974). The court of appeals decision in this case was reviewed in Townsend, *supra* note 1, at 238.

notice³³ of this assignment to RCA by registered mail before the sale of the third machine and before any payments were made. Although this notice was received by an employee of RCA who was authorized to accept notice, it never reached the accounting department. As a result, RCA made all payments on these accounts to Delta. When Delta became insolvent and defaulted on the loan agreement, Economy sued Delta's surety, Ertel. Ertel claimed that, as surety of Delta, he would be subrogated to any rights Economy had in the collateral, including the accounts receivable from RCA, and Ertel joined RCA by third party complaint.

In its defense, RCA first argued that it had already paid a substantial part of the account debts and that the notice of the assignment was not effective to change its responsibility. RCA apparently urged that it had no "knowledge" of the assignment because the communication from Economy never reached its accounting department. The court held that the "fact that the accounting department never received the notice [was] of no consequence in this case."³⁴ The notice required RCA to make payments to Economy and RCA was responsible for wrongful payment.³⁵ Secondly, RCA argued that it had the right to set off, against the assignee, losses caused by defects in the third machine sold by Delta. Basic contract law permits an obligor to recoup against an assignee any claims which arise out of the same contract as the assigned right or to set off against an assignee any claim against the assignor which arises before notice of the assignment. This principle is carried forth in the Uniform Commercial Code provision governing assignments as collateral.³⁶ The court of appeals viewed the three sales of machinery as separate contracts

³³The notice instructed RCA to make all payments on the accounts to Economy. *Ertel v. Radio Corp. of America*, 297 N.E.2d 446, 448 (Ind. Ct. App. 1973).

³⁴307 N.E.2d at 474. The Indiana Supreme Court cited IND. CODE § 26-1-1-201(26) (b) (IND. ANN. STAT. § 19-1-201(26) (b), Burns 1964) which provides that notice is received when "it is duly delivered at the place of business through which the contract was made or at any other place held out by [the person to be notified] as the place for receipt of such communications."

³⁵See IND. CODE § 26-1-9-318(3) (IND. ANN. STAT. § 19-9-318(3), Burns 1964) which provides that the "account debtor is authorized to pay the assignor until the account debtor receives notification that the account has been assigned and that payment is to be made to the assignee."

³⁶*Id.* § 26-1-9-318(1) (IND. ANN. STAT. § 19-9-318(1)) provides that the rights of an assignee are subject to:

- (a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and
- (b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

and, since RCA's claim against Delta involved a sale which occurred after notice of the assignment, the court stated that the claim could not be recouped against the assignee.³⁷ The supreme court, however, held that RCA could use this claim as a defense. The court pointed out that RCA's claim arose from a contract between RCA and Delta which was automatically assigned to Economy. The claim could thus be asserted against the assignee regardless of when notice was given.³⁸ This is undoubtedly correct so long as the court intended RCA to be able to recoup this claim against the assignee on the third sales contract only. If RCA's claim against Delta, for defects in the third machine, was in an amount larger than the amount due on the third contract, it might have been improper to permit RCA to set off against the assignee the balance on the first two contracts.

5. Suretyship

A unique question of subrogation was presented to the Indiana Supreme Court in the *Ertel* case just discussed. The surety, Ertel, claimed that he should be subrogated to Economy's rights in the collateral and, under general suretyship principles, his argument would be well taken.³⁹ However, RCA argued that the court should not permit subrogation because certain "equities" were present.⁴⁰ This argument was based on the close ties between Ertel and Delta and the fact that Delta had wrongfully received payments on the accounts from RCA.⁴¹ The court acknowledged that subrogation was an equitable right but held that the relationship between Ertel and Delta was not sufficiently close to warrant depriving Ertel of the right. The court noted that, although Ertel was a shareholder and secretary-treasurer of Delta, his role was primarily that of investor. Also, Ertel did not become aware of the fact that RCA had been notified of the assignment and of the obligation to make payments to Economy until after Economy had sought payment from him as surety.⁴²

Two noteworthy cases were decided during the year on the subject of surety discharge. One case involved alteration of the

³⁷297 N.E.2d at 450.

³⁸307 N.E.2d at 476.

³⁹RESTATEMENT OF SECURITY § 141 (1941).

⁴⁰The court quoted from *Vonderahe v. Ortman*, 128 Ind. App. 381, 392, 147 N.E.2d 924, 925-26 (1958), as follows: "[Subrogation] is not an absolute right but one which depends upon the equities and attending facts and circumstances of each case." 307 N.E.2d at 475.

⁴¹Delta could not assert any rights of its own against RCA since RCA had already paid Delta on the accounts.

⁴²307 N.E.2d at 475.

contract between principal and creditor and the other involved impairment of collateral by the surety. In both cases, the surety was a non-corporate accommodation party⁴³ to a promissory note and, in both cases, the Indiana Court of Appeals discharged the surety. In *Indiana Telco Federal Credit Union v. Young*,⁴⁴ the court dealt with discharge by alteration of the contract. The maker of the note defaulted and the payee agreed, without notifying the accommodation party, to accept smaller payments over a longer period than called for in the note. The maker made five payments pursuant to this agreement and then declared bankruptcy. The payee sued the accommodation party, and the court held that the agreement extending the time in which the maker could pay was an alteration of the contract which would discharge the accommodation party.⁴⁵

The reasons for giving sureties this kind of protection are not overwhelming. First, in theory, the surety agrees to assume the risk of non-payment by the principal during a certain period of

⁴³Persons who sign negotiable notes for the purpose of lending their credit capacity to another party are referred to in the Uniform Commercial Code as accommodation parties. See UNIFORM COMMERCIAL CODE § 3-415(1), IND. CODE § 26-1-3-415(1) (IND. ANN. STAT. § 19-3-415(1), Burns 1964). They may sign the instrument in any capacity.

⁴⁴297 N.E.2d 434 (Ind. Ct. App. 1973).

⁴⁵The court based its decision on general suretyship principles. Although the result would not be changed, it is possible that the case should have been resolved by the pertinent provisions of the Uniform Commercial Code as enacted in Indiana. Discharge rights of accommodation parties on negotiable instruments are set forth in IND. CODE § 26-1-3-606 (IND. ANN. STAT. § 19-3-606, Burns 1964), which provides that:

The holder discharges any party to the instrument to the extent that without such party's consent the holder

(a) without express reservation of rights releases or agrees not to sue any person against whom the party has, to the knowledge of the holder, a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges . . . such person

Even if the note in the *Indiana Telco* case was not negotiable because it lacked words of negotiability (e.g., pay to the order of), it would still be governed by this section if it were otherwise in form a negotiable instrument. See *id.* § 26-1-3-805 (IND. ANN. STAT. § 19-3-805). Although not explicitly stated in the quoted section, it is clear that the drafters intended unauthorized extension agreements to discharge sureties. In UNIFORM COMMERCIAL CODE § 3-606, Comment 4, the drafters acknowledge that an extension is an act which discharges and state: "This section retains the right of the holder to release one party, or to postpone his time of payment, while expressly reserving rights against others." If there were no discharge, there would be no need to reserve rights. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 434 (1972) [hereinafter cited as WHITE & SUMMERS].

time; prolonging this period then extends his risk and causes injury to the surety in ways that may be difficult to measure. This rationale, however, is tenuous in such cases as *Indiana Telco*, since the principal was already in default when the extension agreement was made. Secondly, when the payee agreed to accept a smaller payment over an extended period of time, the maker's obligation on the note was suspended or discharged. This might have prevented the surety from being subrogated to any rights of the payee on the instrument, thus diminishing his security. To the extent that there are advantages in suing as payee on an instrument, as opposed to suing under a common law right of subrogation, something is thereby lost by the surety. It should be noted that weaknesses in the justification for this discharge rule may be the reason for permitting the creditor, in the case of a negotiable instrument, to avoid the effect of the rule by merely reserving his rights against other parties as part of the extension agreement with the principal debtor.⁴⁶ It is not even necessary for the creditor to notify the surety of the discharge and reservation of rights.⁴⁷

The case involving impairment of collateral was *White v. Household Finance Corp.*⁴⁸ Household Finance Corp. (HFC) made a loan to Butzin to enable him to purchase an auto. Because Butzin was only twenty years old, his aunt and uncle, Charles and Catherine White, participated in the transaction.⁴⁹ All three of these parties signed the loan agreement, a security agreement with

⁴⁶UNIFORM COMMERCIAL CODE § 3-606(2), IND. CODE § 26-1-3-606(2) (IND. ANN. STAT. § 19-3-606(2), Burns 1964), provides:

By express reservation of rights against a party with a right of recourse the holder preserves (a) all his rights against such party as of the time when the instrument was originally due

⁴⁷At least one court has concluded that notice is not necessary to a reservation of rights. See *Parnes v. Celia's, Inc.*, 99 N.J. Super. 179, 4 UCC REP. SERV. 1159 (1968). In this case, the extension may have been conditioned, however, on the surety's consent. An early draft of UNIFORM COMMERCIAL CODE § 3-606 (1952 version) provided that:

An express reservation of rights is not effective as such as against any party whom the holder does not use due diligence to notify within 10 days after the reservation.

The language was omitted in the 1958 version and has not been restored.

⁴⁸302 N.E.2d 828 (Ind. Ct. App. 1973).

⁴⁹Under current Indiana law, Butzin's age would not have been a disability. IND. CODE § 34-1-2-5.5 (Burns Supp. 1974) states:

No contract, sale, release or conveyance executed by a person after reaching his eighteenth (18th) birthday may be avoided by him on the grounds that, at the time the agreement was executed, he was acting under a legal disability by reason of his age. Nor [may any] legal disability by reason of age be asserted as a defense in an action to enforce a contract against a person who executed the agreement after reaching his eighteenth (18th) birthday.

respect to the auto, and a promissory note. Title to the auto was in the names of Charles White and Butzin, with a lien in favor of HFC. Shortly thereafter, the auto was destroyed in a single car accident. The car was insured and the insurance company sent a check for the proceeds of the policy, \$1,850, payable to Butzin and HFC. They, in turn, indorsed the check to an auto dealer in payment for a second auto. Although title to this second auto was taken in the names of Charles White and Butzin, with HFC listed as lienholder, no new security agreement was executed. Also, the Whites were not notified of this application of the insurance funds. When Butzin defaulted, HFC sued the Whites on the original promissory note. The trial court gave judgment for HFC for the full amount due on the note.⁵⁰

The court of appeals reviewed, for the first time in Indiana, important principles of the law of suretyship under the Uniform Commercial Code. HFC argued that the Whites' failure to designate on the note that they were accommodation parties prevented them from claiming defenses based on accommodation status. On this point, the court noted that their accommodation status was adequately shown by oral proof and that this proof is available to show accommodation status in all cases except when a holder in due course without actual notice of the accommodation is the plaintiff.⁵¹ Once the Whites had established their accommodation status, they were entitled to raise suretyship defenses, such as discharge because of the impairment of collateral.⁵² This defense is based on the right of the surety to rely on the collateral for satisfaction of the principal's obligation and to be subrogated to the creditor's rights in the collateral in the event the surety pays the obligation. HFC urged that the purchase of the second auto with the insurance proceeds was merely a substitution of collateral rather than an impairment. The court held, however, that the failure of HFC to obtain a security agreement was an impairment. In the absence

⁵⁰302 N.E.2d at 830.

⁵¹UNIFORM COMMERCIAL CODE § 3-415(3), IND. CODE § 26-1-3-415(3) (IND. ANN. STAT. § 19-3-415(3), Burns 1964), provides:

As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof.

⁵²UNIFORM COMMERCIAL CODE § 3-606(1), IND. CODE § 26-1-3-606(1) (IND. ANN. STAT. § 19-3-606(1), Burns 1964), provides:

The holder discharges any party to the instrument to the extent that without such party's consent the holder . . . (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

of a security agreement, HFC's rights in the collateral were diminished and any rights available to the Whites by way of subrogation were also thereby diminished.⁵³

After determining that there was an impairment of collateral, a question remained as to the extent of discharge. The court of appeals did not address itself specifically to this question, but only reversed and ordered the trial court to enter judgment consistent with its opinion. If there were to be a complete discharge, a judgment should have been entered in favor of the accommodation parties. However, the applicable Uniform Commercial Code provision states that accommodation parties are discharged only "to the extent that" the holder unjustifiably impairs the collateral.⁵⁴ This suggests that the discharge should only be commensurate with the impairment.⁵⁵ The actual impairment in this case could be equal to either the value of the second auto at the date when HFC failed to require a security agreement or \$1,850, the insurance proceeds used to purchase it. In entering its final judgment, the trial court should probably deduct one of these amounts from \$2,094.25, the amount awarded to HFC by the trial court, and enter judgment in favor of HFC for the amount remaining.

6. *Private Statute of Frauds—Waiver*

Frequently, written agreements for construction work contain provisions stating that no extra work or change will be paid for unless there is a written work order or other written agreement covering the extra work or change. These provisions are, in effect, private statutes of frauds. Despite the existence of these provisions, it is common for the field superintendent of a general contractor to demand orally that one subcontractor perform extra work or make changes. For reasons of business expedience, subcontractors often comply with these oral requests. In those cases in which the contract includes such a provision, the performing subcontractor could be exposed to some risks. In response to these risks, the Indiana Subcontractors Association has recommended to its membership that an internal field rule be established requiring an

⁵³The court pointed out that, because of the failure to execute a second security agreement, the Whites' interest with respect to the collateral might be defeated by a trustee in bankruptcy for the debtor's estate, by a subsequent lienholder, or by an administrator of the debtor's estate if the debtor had died. 302 N.E.2d at 837.

⁵⁴UNIFORM COMMERCIAL CODE § 3-606(1), IND. CODE § 26-1-3-606(1) (IND. ANN. STAT. § 19-3-606(1), Burns 1964).

⁵⁵There is some authority in support of this interpretation. See WHITE & SUMMERS 435 n.127.

authorized written work order before any extras or changes are performed.⁵⁶

In *Oxford Development Corp. v. Rausauer Builders, Inc.*,⁵⁷ the Indiana Court of Appeals had an opportunity to rule on the efficacy of this private statute of frauds in construction contracts. The job superintendent of the prime contractor orally instructed a subcontractor to install an underlayment which was not included under their existing contract. When the prime contractor thereafter refused to pay for the extra work, the subcontractor stopped his performance and sued. Among other things, the prime contractor urged that the private statute of frauds prevented recovery for the installation of the underlayment since no writing on the subject had ever been executed. In affirming the trial court's decision for the subcontractor, the court disposed summarily of this contention by holding that the trial court could have found that the prime contractor had waived compliance with the provision. The waiver consisted of the oral agreement, an assurance that a written agreement would later be executed, and a pattern of oral work orders followed by written confirmations.⁵⁸

This decision is a sound and logical application of general contract doctrine.⁵⁹ When both parties to an agreement undertake new responsibilities, there is no reason to refuse to enforce a modification of their agreement, including a modification waiving a private statute of frauds. Also, it is well established that a condition which is not material to the exchange or risks in a contract can be waived without the presence of consideration or reliance.⁶⁰ In this case, the contract, at least impliedly, called for the prime contractor to pay the subcontractor for extras or changes in the work. This obligation was, however, conditioned on the prior existence of a

⁵⁶Subcontractor's Handbook H-7 (1974) (published by the Indiana Subcontractors Ass'n, Inc., 4755 Kingsway Drive, Indianapolis, Indiana).

⁵⁷304 N.E.2d 211 (Ind. 1974). The provision was as follows: "No extra work or changes under this contract will be recognized or paid for, unless agreed to in writing before the work is done or the changes made." *Id.* at 215.

⁵⁸A number of other courts have reached the same conclusion. *See, e.g.,* Rivercliff Co. v. Linebarger, 223 Ark. 105, 264 S.W.2d 843, *cert. denied*, 348 U.S. 834 (1954); American Sheet Metal Works v. Haynes, 67 Wash. 2d 153, 407 P.2d 429 (1965). Both cases were cited by the *Oxford* court.

⁵⁹*But cf.* UNIFORM COMMERCIAL CODE § 2-209(2), IND. CODE § 26-1-2-209(2) (IND. ANN. STAT. § 19-2-209(2), Burns 1964), applicable in sale of goods cases, which provides that a "signed agreement which excludes modification . . . except by signed writing cannot be otherwise modified" It should be noted that this may apply only to modifications without consideration. In any case, an effort to modify which is not successful because of section 2-209(2) may constitute a waiver under section 2-209(4).

⁶⁰RESTATEMENT (SECOND) OF CONTRACTS § 88 (Tent. Drafts Nos. 1-7, 1973).

writing covering the extra work. This is exactly the sort of procedural or technical condition which is often the subject of a waiver.⁶¹

In those cases in which a subcontractor performs extra work pursuant to oral instructions, the portent of *Oxford Development* seems clear; the efficacy of the private statute of frauds provision is in very serious doubt. There is only one question which may remain. The court in *Oxford Development* emphasized that the prime contractor had not only orally requested the extras but had assured the subcontractor that a writing satisfying the private statute of frauds would be subsequently drafted. Further, this assurance was accompanied by a pattern of oral requests followed by written work orders. These assurances and the pattern of conduct could be considered components of the waiver and thus could limit the impact of *Oxford Development*. However, the waiver principle seems broad enough to be activated by an oral request for extra work, standing alone. Indeed, one of the cases upon which the court in *Oxford Development* relied did not involve any such assurances or pattern of conduct.⁶²

B. Legislative Developments

1. Dishonored Checks—Penalty

The risks associated with permitting a check to be dishonored by the drawee bank were recently expanded. To place this expansion in perspective, it is helpful to take note of a law, which has been in effect in Indiana for over forty years, which provided that a person who stopped payment on a check would, if later found to be liable on the check, be responsible for a penalty in the amount of six percent interest on the face amount of the check from the time of execution plus reasonable attorneys' fees.⁶³ The 1973 General Assembly amended this law to expand the application of the penalty provision to include those instances in which a person allows a check or draft to be dishonored by a banking institution because of lack of funds, failure to have an account, or lack of an authorized signature of the drawer or necessary endorser.⁶⁴ The

⁶¹*Id.* Comment *d.*

⁶²*American Sheet Metal Works v. Haynes*, 67 Wash. 2d 153, 407 P.2d 429 (1965).

⁶³IND. CODE § 28-2-8-1 (Burns 1973).

⁶⁴Ind. Pub. L. No. 283 (April 5, 1973), *amending* IND. CODE § 28-2-8-1 (Burns 1973). The law as amended is as follows:

A. person who, having executed and delivered to another person a check or draft drawn on or payable at a banking institution either (1) stops payment on the check or draft, or (2) allows the check or draft to be dishonored by a banking institution because of lack of

purpose of expanding the application of this penalty provision apparently was to try to give a cost free remedy to persons who rely on checks as the equivalent of cash. For example, a retailer may release goods to a buyer in exchange for a check, treating the check as cash and the sale as a cash sale. Dishonor of the check may present the retailer with unanticipated collection expenses usually associated only with credit sales. Under the new law, the retailer may be able to shift these expenses to the buyer furnishing such a check. It might be unfair, however, to permit the payee of such a dishonored check to impose these costs on the drawer in all cases, even when the dishonor was caused by the drawer's inadvertence. Apparently, in an effort to protect against this possibility, the new law provides that the penalty does not apply to a person who has allowed a check to be dishonored if, within ten days after receiving notice of dishonor, he pays to the holder the full amount of the check.⁶⁵

One matter of interpretation may be raised with respect to the new law, but it should be easily resolved. There may be some question as to whether the ten day payment exception protects only drawers of checks dishonored because of lack of funds, failure to have an account, or lack of an authorized signature of the drawer or necessary endorser, or whether it protects drawers in stop payment cases as well. The wording of the statute seems to make it clear that the exemption applies only to the former.⁶⁶

funds, failure to have an account, or lack of an authorized signature of the drawer, or a necessary indorser, is, if the person who took such action is found liable under applicable law to the payee or bona fide holder on the check or draft in a court action, liable also for (1) interest at the rate of eight percent (8%) per annum on the face amount of the check or draft from the date of its execution, (2) court costs, and (3) reasonable attorney's fees in prosecuting the action. This section does not apply to a person who has so allowed a check or draft to be dishonored if, within ten (10) days after receiving notice of dishonor, he pays to the payee or bona fide holder the full amount of the check or draft. Such a payment is effective for all purposes as of the date it is made.

⁶⁵The law was also amended to increase the penalty to eight percent and to provide for recovery of court costs in addition to attorney's fees. These additional recovery provisions are applicable in cases of both stop payment and dishonor because of lack of funds, etc. See note 64 *supra*.

⁶⁶The statute specifies an exemption for those persons who pay the full amount of the check within ten days *after receiving notice of dishonor*. This language seems to contemplate those cases in which the drawer is notified of the fact that a check has not been paid and seems not to contemplate those cases in which the drawer orders payment stopped. In addition, the exemption provision begins by saying that the penalty does not apply to a person who has so allowed a check or draft to be dishonored. This language, also, does not seem to contemplate a stop payment order. See note 64 *supra*.

2. Warehousemen

a. Agricultural Commodities

There have been some significant recent developments in the law with respect to warehousemen. Beginning January 1, 1975, agricultural commodities⁶⁷ warehousemen in Indiana will be subject to a comprehensive licensing and bonding law enacted by the 1973 General Assembly⁶⁸ and amended by the 1974 General Assembly.⁶⁹ There are several noteworthy features of this new law. It provides a licensing requirement for all agricultural commodity warehouse businesses.⁷⁰ The licensing program is to be administered under the supervision of the Lieutenant Governor, as Director,⁷¹ who is given sweeping powers with respect to licensees and applicants for licenses. He may require reports, prescribe forms for warehouse receipts, promulgate regulations, conduct inspections, and require termination of storage upon his determination that a license should be revoked for failure to comply with the law.⁷² An initial inspection of each applicant for a license must be financed by the applicant.⁷³

In addition to being subject to rule-making and inspection by the Director, license applicants must establish two interrelated kinds of financial capacity. First, the Act provides that every licensed warehouseman shall have and maintain a net worth of at least \$10,000, plus an amount equal to ten cents for each bushel of storage capacity.⁷⁴ Secondly, license applicants must furnish a bond executed by the applicant and a licensed corporate surety. The bond is to be conditioned on the performance by the principal of all the obligations of a licensed warehouseman under the Act.⁷⁵ Although the bond is to run in favor of the Director, the Act also grants the right to sue on the bond to grain depositors who have been injured by failure of the warehouseman to fulfill the Act's conditions.⁷⁶ Bonds furnished under the Act must be in an amount equal to

⁶⁷"Agricultural commodities" is a technical term including "corn, wheat, oats, barley, rye, sorghum and soybeans but not including canning crops for processing." IND. CODE § 26-3-7-2 (IND. ANN. STAT. § 67-702, Burns Supp. 1974).

⁶⁸Ind. Pub. L. No. 268 (April 19, 1973), adding IND. CODE §§ 26-3-7-1 to -36 (IND. ANN. STAT. §§ 67-701 to -736, Burns Supp. 1974).

⁶⁹Ind. Pub. L. No. 120 (Feb. 21, 1974), amending IND. CODE §§ 26-3-7-1 to -36 (IND. ANN. STAT. §§ 67-701 to -736, Burns Supp. 1974).

⁷⁰IND. CODE § 26-3-7-4 (IND. ANN. STAT. § 67-704, Burns Supp. 1974).

⁷¹*Id.* § 26-3-7-1 (IND. ANN. STAT. § 67-701).

⁷²*Id.* § 26-3-7-3 (IND. ANN. STAT. § 67-703).

⁷³*Id.* §§ 26-3-7-6(e), -7-17 (IND. ANN. STAT. §§ 67-706(e), 67-717).

⁷⁴*Id.* § 26-3-7-16 (IND. ANN. STAT. § 67-716).

⁷⁵*Id.* § 26-3-7-9 (IND. ANN. STAT. § 67-709).

⁷⁶*Id.* § 26-3-7-11(a) (IND. ANN. STAT. § 67-711(a)).

twenty-five cents per bushel for the first 100,000 bushels of storage capacity, fifteen cents per bushel for the next 100,000, and ten cents per bushel for each bushel over 200,000.⁷⁷ Although there is a maximum of \$100,000 on this bond requirement, an additional amount may be required on the bond to compensate for any deficiency on the part of the warehouseman with respect to the net worth requirement of ten cents per bushel of capacity.⁷⁸

Another important provision of the Act increases the responsibility of the warehouseman for certain types of damage to grain stored in his warehouse. Generally, a warehouseman is only responsible for damage or destruction of goods caused by his failure to exercise reasonable care.⁷⁹ Licensed agricultural commodity warehousemen will be required to keep a policy of insurance covering, at their market value, all commodities which may be stored in their warehouses against loss by fire, internal explosion, lightning and windstorm.⁸⁰ The warehouseman must settle with depositors, at the market value, for any agricultural commodities damaged or destroyed in this manner without regard to fault. In the event the warehouseman fails to settle, the depositor has a direct action against the insurance carrier underwriting the prescribed insurance.⁸¹

The new Agricultural Commodity Licensing and Bonding Act⁸² replaces a statutory system of local "sealers," appointed by the Commissioner of Weights and Measures, which local "sealers" had authority to seal storage bins and issue certificates showing their contents. This system had apparently fallen into disuse and was specifically repealed by the Act.⁸³ The replacement system created by the Act will serve at least two general purposes. First, it should facilitate borrowing on the security of stored grain. The existence of a warehouse receipt from a state-bonded warehouseman should provide significant assurance to lenders who accept grain as collateral. Furthermore, this kind of storage may serve as a less expensive alternative to field warehousing. Secondly, the Act protects against losses to grain owners that may be caused by speculation and failure on the part of warehousemen. This protection will be afforded not only through the supervision of warehousemen, but also by the bond requirements.⁸⁴ Although there is no reason to

⁷⁷*Id.* § 26-3-7-10 (IND. ANN. STAT. § 67-710).

⁷⁸*Id.* § 26-3-7-10(c) (IND. ANN. STAT. § 67-710(c)).

⁷⁹*Id.* § 26-1-7-204(1) (IND. ANN. STAT. § 19-7-204(1), Burns 1964).

⁸⁰*Id.* § 26-3-7-12(a) (IND. ANN. STAT. § 67-712(a), Burns Supp. 1974).

⁸¹*Id.* § 26-3-7-12(b) (IND. ANN. STAT. § 67-712(b)).

⁸²*Id.* §§ 26-3-6-1 to -27 (IND. ANN. STAT. §§ 67-601 to -627).

⁸³Ind. Pub. L. No. 268, § 3 (April 19, 1973).

⁸⁴There is a companion law which licenses and regulates grain dealers. IND. CODE §§ 25-3.5-1-1 to -22 (Burns Supp. 1974).

believe that this system will not work well, there is one apparent weakness. The bonds which will be required in the amounts set forth above will not protect against all contingencies. At most, bonds are only required in amounts equal to thirty-five cents per bushel of storage capacity.⁸⁵ In many cases, agricultural commodities will have a market price far in excess of this amount⁸⁶ and a depositor or his creditor would not be protected to the full value of the deposit.

b. Burden of Proof

A significant development, which concerns all warehousemen,⁸⁷ was brought about by an amendment to a section of the Indiana version of the Uniform Commercial Code. Until this amendment, the Uniform Commercial Code in Indiana provided that a bailee must deliver goods to the person entitled to them under a document of title unless the bailee established "damage to or delay, loss or destruction of goods for which the bailee is not liable."⁸⁸ The National Conference of Commissioners on Uniform State Laws provided optional language in this section which the Indiana legislature did not adopt when it enacted the Code. The optional language provides that "the burden of establishing negligence in such cases is on the person entitled under the document."⁸⁹ The result in

⁸⁵This combines the twenty-five cents per bushel required of all warehousemen who have up to 100,000 bushels capacity with the ten cents per bushel required of all warehousemen in order to compensate for a deficiency in net worth. *See id.* § 26-3-7-10(c) (IND. ANN. STAT. § 67-710(c)).

⁸⁶For example, soybeans often have a market price in excess of \$8.03 per bushel. *See, e.g.,* Wall Street Journal, Sept. 25, 1974, at 22, col. 3.

⁸⁷Although the law under discussion applies to both warehousemen and carriers, it is of very little effect when carriers are concerned. The liability of most carriers for loss or damage is governed by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 20(11) (1970), which imposes nearly absolute liability on carriers, and not just liability for negligence. Those few Indiana carrier contracts not subject to the federal law have the standard of liability established for them by IND. CODE § 26-1-7-309(1) (IND. ANN. STAT. § 19-7-309(1), Burns 1964). This section states that a carrier must exercise that degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. However, it also states that the subsection does not repeal or change any law which imposes liability upon a common carrier for damages not caused by its negligence. Prior Indiana decisions have held that a carrier is a form of insurer of the goods. This insurer status, therefore, is still intact and the burden of proof in a case against a carrier, under either federal or Indiana law, is of little consequence.

⁸⁸IND. CODE § 26-1-7-403(1)(b) (IND. ANN. STAT. § 19-7-403(1)(b), Burns 1964, *as amended, id.* § 26-1-7-403(1)(b) (IND. ANN. STAT. § 19-7-403(1)(b), Burns Supp. 1974).

⁸⁹UNIFORM COMMERCIAL CODE § 7-403(1)(b) (1972 version). Thirteen states have adopted this language; they are Arizona, California, Iowa, Ken-

Indiana was that warehousemen shouldered the burden of establishing freedom from negligence in all cases in which there was damage, delay, or destruction.

The question of who bears this burden in suits against warehousemen for negligent destruction of goods can be of considerable significance. In many cases, the existence of negligence or freedom from negligence cannot be readily proved.⁹⁰ In these cases, the outcome may be determined by the establishment of the burden of going forward with the evidence or the risk of nonpersuasion. Apparently, in an effort to protect Indiana warehousemen, the 1973 General Assembly amended the Uniform Commercial Code to shift these burdens.⁹¹ The legislature did not, however, adopt the optional language provided by the Conference of Commissioners on Uniform State Laws, but instead developed a compromise. In Indiana, this section now provides that the burden is on the persons entitled under the document "whenever the claimed loss or destruction resulted from fire and the amount of claimed loss or destruction . . . exceeds the sum of ten thousand dollars . . ."⁹² This somewhat curious compromise can be explained in the following manner. First, fire could be the most common and the most frequently litigated cause of loss. Damage by wind or water would probably not as often be attributable to the warehouseman's neglect. Thus, the amendment would have the effect of covering most of the significant cases. Secondly, the monetary limit may be based on an assumption about the capacity of various bailors to absorb the costs of investigation of loss and litigation of claims. Bailors with a claim for less than \$10,000 may be persons, such as small businessmen, who store goods on a small scale or who might not have a sufficient financial stake in the goods to warrant paying the costs of investigation and litigation. The opposite assumption could be made about persons who had claims in excess of \$10,000. Although these assumptions are, at best, empirically fragile, they seem to be the only explanation for the compromise.

3. *Chattel Mortgage Payment Receipts*

The 1973 General Assembly made a significant change in a statute which required a mortgagee of household goods to give a

tucky, Maryland, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas and Wyoming.

⁹⁰WHITE & SUMMERS 674.

⁹¹Ind. Pub. L. No. 265 (April 17, 1973), *amending* IND. CODE § 26-1-7-403(1)(b) (IND. ANN. STAT. § 19-7-403(1)(b), Burns Supp. 1974).

⁹²*Id.*

receipt for payments made on the debt.⁹³ The law now requires the mortgagee to give the mortgagor a receipt showing the amount of payment applied to interest, the amount applied to principal, and the amount of the unpaid balance.⁹⁴ However, the requirement of a receipt is obviated whenever the mortgagor makes a payment by check. The penalty for failure to give such a receipt, when required, is drastic. Failure to execute the receipt voids the mortgage, and the mortgagor is then restricted to a remedy based solely on the underlying debt.

VII. Criminal Law and Procedure

*William A. Kerr**

Criminal cases continue to constitute a major portion of the workload confronting the Indiana appellate courts. During the past year, the Indiana Supreme Court filed approximately 100 criminal opinions and the various divisions of the court of appeals filed approximately 190 criminal opinions. In view of the number of opinions filed during the year, this survey must be somewhat selective in nature. The opinions that are included in the survey are reviewed in the general order in which the respective issues involved would arise in the various stages of the criminal process, beginning with pretrial issues and continuing with issues pertaining to the trial and post-trial stages. One opinion of the Indiana Supreme Court is considered first, however, because of its significance for criminal law and procedure in general.

During the 1973 session of the Indiana General Assembly, a portion of the proposed Indiana Code of Criminal Procedure prepared by the Indiana Criminal Law Study Commission was enacted into law.¹ The enacted provisions purportedly became effective on August 1, 1973, following promulgation, but their effectiveness was questionable because of an opinion filed by the Third District Court of Appeals on June 26, 1973, which suggested that

⁹³Ind. Pub. L. No. 267 (April 10, 1973), *amending* IND. CODE § 26-2-2-3 (IND. ANN. STAT. § 51-203, Burns Supp. 1974).

⁹⁴*Id.*

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¹IND. CODE §§ 35-1.1-1-1 *et seq.* (IND. ANN. STAT. §§ 9-100 *et seq.*, Burns Supp. 1974); *id.* §§ 35-2.1-1-1 *et seq.* (IND. ANN. STAT. §§ 9-402 *et seq.*); *id.* §§ 35-2.1-1-1 *et seq.* (IND. ANN. STAT. §§ 9-903 *et seq.*); *id.* §§ 35-4.1-1-1 *et seq.* (IND. ANN. STAT. §§ 9-1202 *et seq.* All laws, parts of laws, or amendments repealed by these sections are found in Ind. Pub. L. No. 325, § 5 (April 23, 1973).

the provisions would not become effective until approved by the Indiana Supreme Court.² Thereafter, in an unusual procedure, the Indiana Supreme Court issued a unanimous opinion in the case, denying a petition to transfer but disapproving the suggestion of the Third District Court of Appeals concerning the effectiveness of the newly enacted rules of procedure.³ In this opinion, the Indiana Supreme Court concluded that the new rules were in effect and would continue in effect unless the court decided to promulgate rules designed to supersede the ones enacted by the General Assembly or unless any particular provision enacted by the legislature conflicted with a "specific existing rule of this Court."⁴ Although this decision helped to clarify the controversy concerning the new rules, the issue was not fully resolved because of the court's reference to a "specific existing rule of this Court." The opinion suggests that the legislative rules are valid even though the rules may conflict with prior decisional rulings of the supreme court, but the opinion does not consider or refer to this possibility and the term "specific existing rule" may be broad enough to cover more than the codified rules of procedure promulgated by the supreme court.

A. Search and Seizure

1. Necessity for Arrest Warrants

Both the United States Constitution and the Indiana constitution include provisions prohibiting unreasonable searches and

²Neeley v. State, 297 N.E.2d 847, 851 n.5 (Ind. Ct. App. 1973). The various divisions of the Indiana Court of Appeals are distinguished throughout this Article in accordance with the particular district involved because of the author's conclusion that these divisions are somewhat autonomous in nature and are somewhat comparable to the various federal circuit courts of appeal. See the author's discussion of this point in Kerr, *Criminal Procedure, 1973 Survey of Indiana Law*, 7 IND. L. REV. 112, 113 n.5 (1973). In that Article, the author predicted that the autonomous nature of the divisions would become apparent and that the various divisions could be expected to develop a body of case law that would differ from division to division. This prediction came true during the past year, within a short time after the completion of the previous Article. The Third District Court of Appeals filed its opinion in Bryant v. State, 299 N.E.2d 200, on July 31, 1973, and the Second District Court of Appeals filed its opinion in Williams v. State, 299 N.E.2d 882, on August 13, 1973. The Second District Court of Appeals referred to the earlier opinion and expressly disagreed with it. *Id.* at 887-88. As a result of the conflict in these decisions, the Indiana Supreme Court granted a petition for transfer in the Williams case and reversed the decision of the Second District Court of Appeals. Williams v. State, 307 N.E.2d 457 (Ind. 1974).

³Neeley v. State, 305 N.E.2d 434 (Ind. 1974).

⁴*Id.* at 435.

seizures, but neither specifically requires that a warrant be obtained for a lawful arrest or a lawful search. Each constitution merely provides that persons are to be protected from unreasonable searches and seizures and that warrants are not to be issued except (1) when properly obtained by a showing of probable cause supported by a proper oath or affirmation and (2) when issued with particular descriptions of the place to be searched or the persons or things to be seized.⁵ These provisions have generally been interpreted to mean that an officer must obtain a warrant for a search if it is at all practicable for him to do so,⁶ but this "practicableness test" has not generally been applied to arrests.⁷

In Indiana, all peace officers are authorized by statute to make warrantless arrests for any offense committed within the presence of such officers.⁸ An officer may therefore make a warrantless arrest for a misdemeanor committed in his presence and may conduct a search incident to such an arrest.⁹ An officer may likewise make a warrantless arrest for a felony committed in his presence and may conduct a search incident to such an arrest.¹⁰ With regard to offenses committed outside the presence of peace officers, it has been held that an officer cannot make a warrantless arrest for a misdemeanor unless the offense is committed in his presence.¹¹ On the other hand, the Indiana law is uncertain with regard to felonies because the cases are presently in a state of confusion. The traditional view appears to be that an officer may make a warrantless arrest for a felony committed out of his presence provided that he has probable cause to make the arrest.¹² The traditional view appears to have been restated in a number of cases during the past year.¹³

⁵U.S. CONST. amend. IV; IND. CONST. art. 1, § 11.

⁶*Chapman v. United States*, 365 U.S. 610 (1961); *Idol v. State*, 233 Ind. 307, 119 N.E.2d 428 (1954).

⁷*United States v. Miles*, 468 F.2d 482, 486 (3d Cir. 1972); *United States v. Bazinet*, 462 F.2d 982, 987 (8th Cir.), *cert. denied*, 409 U.S. 1010 (1972).

⁸IND. CODE § 35-1-21-1 (IND. ANN. STAT. § 9-1024, Burns Repl. 1956).

⁹*Lander v. State*, 238 Ind. 680, 154 N.E.2d 507 (1958) (arrest for gambling and search revealed narcotics); *Rucker v. State*, 225 Ind. 636, 77 N.E.2d 355 (1948) (arrest for failure to display driver's license and search revealed stolen liquor).

¹⁰*Von Hauger v. State*, 254 Ind. 69, 257 N.E.2d 669 (1970); *Williams v. State*, 253 Ind. 316, 253 N.E.2d 242 (1969).

¹¹*Brooks v. State*, 249 Ind. 291, 231 N.E.2d 816 (1967).

¹²*Peterson v. State*, 250 Ind. 269, 273, 234 N.E.2d 488, 490-91 (1968); *Wagner v. State*, 249 Ind. 457, 461, 233 N.E.2d 236, 238 (1968); *Manson v. State*, 249 Ind. 53, 56, 229 N.E.2d 801, 803 (1967); *Johns v. State*, 235 Ind. 464, 466, 134 N.E.2d 552, 553 (1956).

¹³*Garr v. State*, 312 N.E.2d 70, 71 (Ind. 1974); *Holloway v. State*, 300 N.E.2d 910, 913 (Ind. Ct. App. 1973); *McGowan v. State*, 296 N.E.2d 667,

Despite these cases reflecting the traditional view, two of the divisions of the Indiana Court of Appeals stated in opinions during the past year that an officer must obtain an arrest warrant in order to make an arrest for a felony committed outside his presence unless it is impracticable for him to do so or other exigent circumstances exist which excuse him from doing so.¹⁴ These cases follow a line of three opinions issued in recent years by the Indiana Supreme Court, although each of the decisions of the court of appeals referred to only one of the three supreme court opinions. The first statement of this type appears to be in the concurring opinion in the 1968 case of *Hadley v. State*.¹⁵ There it was said that the United States Supreme Court has followed the "practicableness test" with reference to search warrants and that the "same test of 'practicality' was applied by that Court to the law of arrest."¹⁶ It should first be noted that the *Hadley* concurring opinion represented the views of only two members of the court. Furthermore, the opinion cited only one case in support of this statement, and that case did not hold that arrest warrants were required with reference to felonies committed outside the presence of the arresting officers.¹⁷ The first statement of this type in a majority opinion of the Indiana Supreme Court appeared in the 1970 case of *Throop v. State*.¹⁸ The court asserted that there is "ample authority for the proposition that when it is practical for officers to obtain a warrant prior to an arrest, they should do so,"¹⁹ but the opinion did not cite a single case in support of this statement. Five months later, a third statement appeared in the case of *Stuck v. State*.²⁰ In this opinion, the Indiana Supreme Court asserted that "[c]learly and undeniably the United States Constitution provides that arrests and searches shall

669 (Ind. Ct. App. 1973); *Mentzer v. State*, 296 N.E.2d 136, 139 (Ind. Ct. App. 1973); *Cheeks v. State*, 292 N.E.2d 852, 855 (Ind. Ct. App. 1973).

¹⁴*Bryant v. State*, 299 N.E.2d 200, 203 (Ind. Ct. App. 1973); *Johnson v. State*, 299 N.E.2d 194, 197 (Ind. Ct. App. 1973).

¹⁵251 Ind. 24, 40, 238 N.E.2d 888, 896 (1968) (Lewis, J., concurring), *cert. denied*, 394 U.S. 1012 (1969).

¹⁶251 Ind. at 40, 238 N.E.2d at 896.

¹⁷*Trupiano v. United States*, 334 U.S. 699, 704 (1948). The *Trupiano* case held that an arrest was lawful because officers made the arrest after observing the defendants committing a felony in their presence, but the opinion refers to *Carroll v. United States*, 267 U.S. 132, 156-57 (1925), a case in which the United States Supreme Court discussed the general authority of an officer to arrest without warrant for a misdemeanor committed in his presence or for a felony upon the basis of probable cause.

¹⁸254 Ind. 342, 344, 259 N.E.2d 875, 877 (1970).

¹⁹*Id.* The arrest without a warrant was found to be lawful because the arrest occurred on a Sunday when the courts were not open and at a time when the defendants were in an automobile and could have escaped during the time necessary to obtain a warrant.

²⁰255 Ind. 350, 357, 264 N.E.2d 611, 615 (1970).

be made under authority of a warrant" and that "a warrant must be secured wherever practicable,"²¹ but the court cited only two cases in support of these assertions. The first case cited was the *Hadley* case. The second case was *United States v. Duke*,²² but this opinion clearly supports the opposite point of view with the conclusion that "irrespective of the time element, the cases strongly support the right, where probable cause exists, of an officer to arrest and search without a warrant."²³

It is this line of cases which the two divisions of the court of appeals followed during the past year. In *Johnson v. State*,²⁴ an officer looked through a hole in the door to the defendant's apartment, observed the defendant inject something into his arm, and promptly arrested him. The defendant argued that the arrest and accompanying search were invalid because the officer could have obtained a warrant for his arrest and for a search of his apartment. Although the Second District Court of Appeals concluded that the arrest and search were lawful, it did so by holding that an arrest warrant was not required because the officer had probable cause to believe that an offense was being committed in his presence. In so doing, the court stated that it agreed that "warrants should be obtained whenever practicable" and cited *Throop* in support of the statement.²⁵ A similar conclusion was also reached by the Third District Court of Appeals in *Bryant v. State*,²⁶ but that court cited *Stuck* instead of *Throop* in reaching its conclusion. In the *Bryant* case, an officer received a report of an armed robbery and stopped a suspect who was riding in a taxicab and who met the description of the armed robber. The court of appeals concluded that there were sufficient exigent circumstances to justify the arrest of the robber without a warrant.

The three supreme court opinions and two court of appeals opinions may be interpreted to mean that warrants are required for all arrests, even when an officer has probable cause for an arrest, unless it is impracticable for a warrant to be obtained or unless other exigent circumstances exist which would justify the failure to obtain a warrant. If so, these cases appear to be contrary to earlier Indiana decisions²⁷ and contrary to other recent decisions

²¹*Id.* at 356-57, 264 N.E.2d at 614-15. The arrest without a warrant was found to be lawful because of the existing exigent circumstances, including the fact that the defendant had shot a police officer, had taken his gun, and had fled, and was thus a potentially dangerous person on the loose.

²²369 F.2d 355 (7th Cir. 1966), *cert. denied*, 386 U.S. 934 (1967).

²³369 F.2d at 357.

²⁴299 N.E.2d 194 (Ind. Ct. App. 1973).

²⁵*Id.* at 197.

²⁶299 N.E.2d 200, 203 (Ind. Ct. App. 1973).

²⁷See cases cited note 12 *supra*.

of the same courts.²⁸ For example, in *Sanchez v. State*,²⁹ a case decided after the three Indiana Supreme Court cases discussed above, the defendant was arrested without a warrant when an officer observed the defendant using narcotics. Instead of sustaining the arrest because of the fact that the offense was committed in the presence of the officer, the Indiana Supreme Court held that the arrest was proper because probable cause existed for the arrest.³⁰ In so doing, the court cited *Johns v. State*³¹ and *Manson v. State*,³² two earlier cases which followed the traditional view. Likewise, in *Smith v. State*,³³ the Indiana Supreme Court applied the same test of probable cause to sustain a warrantless arrest of a defendant who had committed a burglary out of the presence of the arresting officer. This latter case was quoted and relied upon by the Second District Court of Appeals in *Mentzer v. State*³⁴ to sustain the validity of a warrantless arrest of a defendant who had also committed a burglary out of the presence of the arresting officer. Finally, the Indiana Supreme Court said in *Garr v. State*,³⁵ the most recent decision on the subject, that there is "no question but what a police officer may arrest a suspect without a warrant when he has probable cause to believe that a felony has been committed by the person arrested."³⁶ This was a unanimous opinion, and the court upheld the validity of a warrantless arrest of the defendant who had committed statutory rape on a two-year old child out of the presence of the arresting officer.

2. Execution of Warrants

The Indiana Court of Appeals decided two important cases during the past year concerning the execution of search warrants. In *McAllister v. State*,³⁷ officers obtained a warrant to search an inn for certain drugs and narcotics. During the course of the search based upon this warrant, the officers searched the patrons at the inn and found a packet of marijuana in the defendant's pocket. It

²⁸See cases cited note 13 *supra*.

²⁹256 Ind. 140, 267 N.E.2d 374 (1971).

³⁰*Id.* at 142, 267 N.E.2d at 375.

³¹235 Ind. 464, 466, 134 N.E.2d 552, 553 (1956).

³²249 Ind. 53, 56, 229 N.E.2d 801, 803 (1967).

³³256 Ind. 603, 607-08, 271 N.E.2d 133, 136 (1971).

³⁴296 N.E.2d 136, 139 (Ind. Ct. App. 1973).

³⁵312 N.E.2d 70 (Ind. 1974).

³⁶*Id.* at 71. See also *Kindred v. State*, 312 N.E.2d 100, 102 (Ind. Ct. App. 1974).

³⁷306 N.E.2d 395 (Ind. Ct. App. 1974). This case also emphasized the fact that an officer's probable cause affidavit must be incorporated in the body of a warrant, either by being recopied verbatim therein or by being attached to the warrant and incorporated in the warrant by reference thereto.

was argued by the State that the search warrant permitted a search of the persons on the premises as well as the place specifically described in the warrant, but the court of appeals rejected this argument. The First District Court of Appeals concluded that a warrant must specifically describe both the place to be searched and the person or persons to be searched on the premises, although it did recognize that exceptions might exist which would permit a search of the persons on the premises. For example, the court suggested that a person at the inn might have been searched if officers had observed some of the specified drugs in the hands of such a person.

In *Foxall v. State*,³⁸ officers obtained a warrant to search the defendant's apartment for a stolen television set and some packets of heroin. The television set was found during the search of the apartment, and the defendant, who was at the apartment during the search, was placed under arrest for obtaining control over stolen property. An officer then started to search the defendant, and the defendant attempted to place something in his mouth. A struggle ensued during which the defendant apparently suffered three broken ribs and other injuries, and the officers obtained several packets of heroin from the defendant's mouth by inserting a plastic shoehorn therein. The First District Court of Appeals held that the seizure was valid and that reasonable force could be used to prevent a person from destroying evidence. The opinion did not clearly indicate whether the search of the defendant was based upon the arrest of the defendant or the warrant for the search of the apartment, but the search apparently could have been justified under either theory.

3. *Consent to Searches*

Although the United States Supreme Court has clearly held that a warning of rights is not required before a suspect is asked to consent to a search, at least when the suspect is not in custody,³⁹ the issue remains somewhat in question as to persons in custody.⁴⁰ The Indiana Court of Appeals has apparently held, however, that the warnings are not required even for persons in custody. In *Black-*

³⁸298 N.E.2d 470 (Ind. Ct. App. 1973).

³⁹*Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

⁴⁰The court, in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), appeared to suggest that the warnings are not required in any case involving consent to a search since the Court distinguished between rights under the fifth amendment intended to protect the integrity of the truth-determining function and promote the fairness of a trial, and rights under the fourth amendment intended to protect a person's right of privacy. Despite this distinction, the Court ultimately concluded with the narrow holding that the decision applied only to a person not in custody.

wood v. State,⁴¹ the defendant was arrested in connection with the theft of a coin collection. While he was in jail under arrest, he was advised of his rights, in accordance with *Miranda v. Arizona*,⁴² and then was asked for permission to search his car. He gave verbal permission but refused to sign a consent form and thereafter contended that the consent was invalid. The First District Court of Appeals upheld the validity of the consent despite the fact that the defendant was apparently advised only of his *Miranda* rights under the fifth amendment without any warning as to his fourth amendment rights. This distinction is not discussed by the court and it is possible that the fourth amendment warnings were in fact given, but the opinion states only that the defendant was given his "full *Miranda* warnings."⁴³

No Indiana case has yet held that warnings of rights are required, either for persons in custody or for persons not in custody, but some Indiana policemen are apparently giving the warnings merely as an added precaution. In *Zupp v. State*,⁴⁴ for example, the defendant was arrested, was advised of his fourth amendment rights, and was asked to sign a consent for a search of his automobile and living quarters. The Indiana Supreme Court endorsed the practice but did not require it. Likewise, in *Cooper v. State*,⁴⁵ the defendant was advised of both his fifth amendment and his fourth amendment rights and was asked for permission to search his automobile. He was not in custody at the time and the Second District Court of Appeals, in upholding the consent, noted that the officers had complied even with the requirements suggested by the dissenting opinion in the United States Supreme Court opinion of *Schneckloth v. Bustamonte*.⁴⁶

4. Stop and Frisk

Indiana's "stop and frisk" statute⁴⁷ continues to be the subject of a number of unanswered questions,⁴⁸ but the Indiana appellate

⁴¹299 N.E.2d 622 (Ind. Ct. App. 1973).

⁴²384 U.S. 436 (1966).

⁴³299 N.E.2d at 624.

⁴⁴283 N.E.2d 540, 541 (Ind. 1972).

⁴⁵301 N.E.2d 772 (Ind. Ct. App. 1973).

⁴⁶412 U.S. 218, 277 (1973) (Marshall, J., dissenting), noted in *Cooper* 301 N.E.2d at 775. In *Boys v. State*, 304 N.E.2d 789, 792 (Ind. 1973) (Hunter, J., concurring), two justices of the Indiana Supreme Court, in a concurring opinion, suggested that officers should be required to advise suspects of their fourth amendment rights before requesting a consent to search, even when the suspects were not in custody. The justices also suggested that a written waiver form should be used with the warnings being printed on the form.

⁴⁷IND. CODE §§ 35-3-1-1 to -3 (IND. ANN. STAT. §§ 9-1048 to -1050, Burns Supp. 1974).

⁴⁸For example, may an officer require a suspect to identify himself or answer any questions asked? May the officer arrest a suspect who refuses

courts did begin to provide answers to some of the questions during the past year. The Third District Court of Appeals was the first Indiana appellate court to consider the effect of the statute, and it apparently concluded, in *Bryant v. State*,⁴⁹ without specifically saying so, that the statute was constitutional because of the United States Supreme Court decisions in *Terry v. Ohio*⁵⁰ and *Adams v. Williams*⁵¹ and the decision of the Indiana Supreme Court in *Luckett v. State*.⁵² A similar conclusion appears to have been reached shortly thereafter by the Second District Court of Appeals in *Williams v. State*,⁵³ although this decision was later reversed by the Indiana Supreme Court on another ground.⁵⁴

Both of these cases go beyond a consideration of the statute, however, and recognize that a stop and frisk may be justified by either the *Luckett* case or the statute and that the statute is more limited than the *Luckett* case. The statute provides that an officer may make an investigative stop if he "reasonably infers from the observation of unusual conduct under the circumstances and in light of his experience" that criminal activity has occurred. The two courts concluded that the officer would not be limited by this statute but could rely upon information received from other sources in determining the need for a stop and frisk. The two courts then agreed that an officer could stop a person on less than probable cause,⁵⁵ but the Second District Court of Appeals apparently concluded that an officer could not stop a person in a motor vehicle on less than probable cause. It was this conflict in the opinions which prompted the Indiana Supreme Court to grant a petition for transfer of the *Williams* case. In reversing *Williams*, however, the plurality opinion of the supreme court did not discuss the "stop and frisk" statute. Instead, the court relied only on the standard set forth in *Luckett*. In the *Luckett* case, the supreme court concluded that a motor vehicle may be stopped if an officer has knowledge of facts which are "sufficient to warrant a man of reasonable caution

to answer any questions asked? May the suspect be required to accompany the officer to another place for questioning or while the officer is checking on an answer or an explanation given by the suspect?

⁴⁹299 N.E.2d 200 (Ind. Ct. App. 1973). The court reaffirmed its views and rejected the decision of *Williams v. State*, 299 N.E.2d 882 (Ind. Ct. App. 1973), in the later case of *Bonds v. State*, 303 N.E.2d 686, 690 (Ind. Ct. App. 1973).

⁵⁰392 U.S. 1 (1968).

⁵¹407 U.S. 143 (1972).

⁵²284 N.E.2d 738 (Ind. 1972).

⁵³299 N.E.2d 882 (Ind. Ct. App. 1973), noted in 7 IND. L. REV. 1064 (1974).

⁵⁴307 N.E.2d 457 (Ind. 1974).

⁵⁵See *Williams v. State*, 299 N.E.2d 882, 886 (Ind. Ct. App. 1973).

in the belief that an investigation was appropriate.”⁵⁶ This language was quoted by the supreme court in *Williams* in support of its conclusion that an officer may stop a person in a motor vehicle on less than probable cause.⁵⁷ The amount of information required under the statute and the *Luckett* case may ultimately be the same, but the opinions make it clear that there are presently two standards involved in Indiana “stop and frisk” law. The statutory standard emphasizes an officer’s knowledge which is obtained by way of “observation” whereas the *Luckett* standard emphasizes the officer’s knowledge which may include knowledge gained from other sources or from prior events.

The amount of information necessary to justify a “stop and frisk” was also considered in two other decisions of the Second District Court of Appeals and the Third District Court of Appeals during the past year. In *Elliott v. State*,⁵⁸ officers received a tip that a certain person was to make delivery of drugs at a certain place. The officers went to the address, observed two other persons, who were known narcotics users, walking away from the building, stopped the persons, and frisked them. The Second District Court of Appeals held that the stop and frisk could not be justified under the statute by what was observed at the scene and could not be justified under the *Luckett* standard because there was no showing that the informer’s tip was reliable. In *Jackson v. State*,⁵⁹ officers received a tip that the defendant was at a certain place carrying a gun. The officers located the defendant near a tavern sitting in his car in a parking lot. He was asked to step out of his car, and the officers observed a pistol sticking out of his pocket. After he admitted that he did not have a permit for the pistol, he was arrested. The Third District Court of Appeals also held that the seizure was improper because the informer’s tip was not shown to be reliable.

5. Motor Vehicle Searches and Seizures

Indiana joined an increasing number of states in 1970 when the Indiana Supreme Court held in *Paxton v. State*⁶⁰ that a motor vehicle may not be searched following the driver’s arrest for a traf-

⁵⁶284 N.E.2d 738, 742 (Ind. 1972).

⁵⁷307 N.E.2d 457, 459 (Ind. 1974).

⁵⁸309 N.E.2d 454 (Ind. Ct. App. 1974).

⁵⁹301 N.E.2d 370 (Ind. Ct. App. 1973).

⁶⁰255 Ind. 264, 263 N.E.2d 636 (1970). See also *United States v. Humphrey*, 409 F.2d 1055, 1058 (10th Cir. 1969); *People v. Superior Court*, 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970); *People v. Thomas*, 81 Ill. 2d 212, 201 N.E.2d 413, cert. denied, 380 U.S. 936 (1964); *Lane v. Commonwealth*, 386 S.W.2d 743 (Ky. Ct. App. 1965); *People v. Gonzales*, 356 Mich. 247, 97 N.W.2d 16 (1959); *People v. Marsh*, 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967); Annot., 10 A.L.R.3d 314 (1966).

fic violation unless exigent circumstances exist that would justify such a search and suggested that such circumstances probably would not exist in most traffic arrest cases. In the *Paxton* case, the defendant was arrested on a charge of reckless driving and was placed in the arresting officers' squad car. A search was then made of the defendant's car and various stolen items were found inside the car and in the trunk. The search was held unlawful because (1) it could not be justified as a search for weapons for the protection of the officers since the defendant was in custody in the squad car, (2) the officers had no reason to search the car for the protection of property in it since the defendant's companions could not have driven the car away, (3) the officers had no reason to believe that the vehicle contained evidence related to the reckless driving charge, and (4) the officers had no reason to believe that the car contained stolen goods. In its opinion, the court expressed the view that in most cases an officer would probably not have reason to search a vehicle for weapons or evidence incident to a traffic arrest.⁶¹ In a footnote, the court added that a similar question could have been raised concerning the search of the defendant's person after the traffic arrest, but that the question was not raised and thus was not considered by the court.⁶²

The *Paxton* decision was followed by the First District Court of Appeals during the past year,⁶³ but its continued validity has been placed in doubt by the recent decisions of the United States Supreme Court in *United States v. Robinson*⁶⁴ and *Gustafson v. Florida*⁶⁵ and the decision of the Indiana Supreme Court in *Frasier v. State*.⁶⁶ In the *Frasier* case, the defendant was stopped because of a noisy muffler. After observing what appeared to be a tire tool or a pry bar protruding from a paper sack inside the car, the arresting officer ordered the defendant and his companion to get out of the car. The officer then reached inside the car and opened the paper sack which contained a tire tool, three pink rubber gloves, and a hunting knife. Becoming more suspicious, the officer then asked the two men for identification. When the driver pulled a pistol, the officer shot and killed him. The officer then arrested the defendant, conducted a full search of the car, and found numerous stolen items. The defendant argued that the items taken from the car were seized

⁶¹255 Ind. at 274, 263 N.E.2d at 641.

⁶²*Id.* at 274 n.3, 263 N.E.2d at 641 n.3. See *People v. Superior Court*, 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972); *People v. Watkins*, 19 Ill. 2d 11, 166 N.E.2d 433 (1960); *Barnes v. State*, 25 Wis. 2d 116, 130 N.W.2d 264 (1964).

⁶³*Mann v. State*, 292 N.E.2d 635 (Ind. Ct. App. 1973).

⁶⁴414 U.S. 218 (1973).

⁶⁵414 U.S. 260 (1973).

⁶⁶312 N.E.2d 77 (Ind. 1974).

improperly because the officer had no authority to open the paper sack in the first search of the car. In a four to one decision, the Indiana Supreme Court rejected this argument and relied upon the *Robinson* and *Gustafson* decisions to sustain the search of the car. The *Robinson* and *Gustafson* decisions, however, dealt only with the search of a person following a traffic arrest and did not consider the authority of an officer to search a motor vehicle. Furthermore, the *Robinson* and *Gustafson* cases involved "custodial arrests" and the application of the decisions to "non-custodial arrests" was specifically left unresolved.⁶⁷ The *Frasier* case thus resolves both of these questions, at least for Indiana, by holding that the search incident to the traffic arrest may extend to the motor vehicle⁶⁸ and that no distinction should be made between arrests by which a person is transported to the police station and arrests after which the person is given the option of proceeding on his way after signing a promise to appear in court as directed.⁶⁹ The *Frasier* decision thus would appear to overrule or limit the effect of *Paxton*, although the *Paxton* decision is cited only in the *Frasier* dissenting opinion.⁷⁰

B. Lineups and Photographic Identifications

1. Lineups

An opinion of the Indiana Supreme Court during the past year that might appear to merit little, if any, attention may in fact contain an indication as to the court's interpretation of the controver-

⁶⁷414 U.S. at 236 n.6.

⁶⁸The Illinois appellate court reached a similar conclusion in *People v. Cannon*, 310 N.E.2d 673 (Ill. Ct. App. 1974).

⁶⁹See IND. CODE §§ 9-4-1-130, -131 (Burns 1973). The decision may be interpreted in two different ways: (1) the *Frasier* case may hold that the *Robinson* and *Gustafson* cases apply to "non-custodial" arrests as well as to "custodial arrests," or (2) the *Frasier* case may hold that the *Robinson* and *Gustafson* decisions apply because all arrests, at least in Indiana, are "custodial" by definition. By statute, an arrest "is the taking of a person into custody that he may be held to answer for a public offense." *Id.* § 35-1-17-1 (IND. ANN. STAT. § 9-1004, Burns Repl. 1956). Furthermore, the statute providing for the release of persons on their written promise to appear concludes with the direction that the officer "shall forthwith release the person arrested from custody." *Id.* § 9-4-1-131(d) (Burns 1973). By this view, the person is in custody by virtue of the arrest, and the officer is given authority to release the individual by setting the appropriate bail bond, a release on the person's promise to appear.

⁷⁰Neither the majority nor the dissenting opinion referred to the decision of the First District Court of Appeals in *Sizemore v. State*, 308 N.E.2d 400, 407 n.3 (Ind. Ct. App. 1974). In that case, the court expressed "grave doubt" that the *Robinson* and *Gustafson* decisions would apply to arrests for minor traffic offenses involving a release on a promise to appear.

sial case of *Kirby v. Illinois*.⁷¹ The *Kirby* case held that a defendant has no right to the presence of an attorney at a pretrial identification that occurs before formal "adversary judicial proceedings" have been instituted.⁷² This language, however, has been interpreted differently by various courts. Some courts have concluded that the right to counsel arises only after an indictment or information has been filed,⁷³ others have concluded that the right arises at least as soon as an arrest warrant has been issued against a defendant,⁷⁴ and at least one court has concluded that *Kirby* cannot be applied "mechanically" and that the right to counsel at a lineup must be determined from a consideration of all of the circumstances surrounding the particular lineup.⁷⁵

In *Hardin v. State*,⁷⁶ the Indiana Supreme Court made its first reference to the *Kirby* case as it unanimously affirmed a decision of the Second District Court of Appeals.⁷⁷ The relatively brief opinion stated that the court of appeals reached the proper decisions concerning the propriety of a pretrial identification of the defendant and the sufficiency of the evidence for the conviction of robbery but that the court of appeals improperly relied upon information outside the trial record in determining the sufficiency of the evidence. The significance of the opinion is in the fact that the Indiana Supreme Court cited the *Kirby* case and affirmed the decision of the court of appeals which contained the statement that the *Kirby* case "has held that the *Wade-Gilbert* rule is inapplicable to confrontations which take place before the defendant has been formally charged with the crime."⁷⁸ Since the defendant had been arrested but not yet formally charged by way of an information or indictment at the time of the identification, this case may indicate that both the Second District Court of Appeals and the Indiana Supreme Court agree that *Kirby* requires counsel only at an identification after an information or indictment has been filed. In fact, this view has been expressed by two of the three divisions of the Indiana Court of Appeals during the past year.⁷⁹

⁷¹406 U.S. 682 (1972). For a discussion of this case, see Kerr, *Criminal Procedure*, 1973 *Survey of Indiana Law*, 7 IND. L. REV. 112, 123-24 (1973).

⁷²406 U.S. at 689.

⁷³*Commonwealth v. Lopes*, 287 N.E.2d 118 (Mass. 1972); *Chandler v. State*, 501 P.2d 512 (Okla. 1972).

⁷⁴*United States ex rel. Robinson v. Zelker*, 468 F.2d 159 (2d Cir. 1972); *Arnold v. State*, 484 S.W.2d 248 (Mo. 1972).

⁷⁵*Moore v. Oliver*, 347 F. Supp. 1313, 1319 (W.D. Va. 1972).

⁷⁶296 N.E.2d 784 (Ind. 1973).

⁷⁷287 N.E.2d 359 (Ind. Ct. App. 1972).

⁷⁸*Id.* at 360.

⁷⁹*Smith v. State*, 312 N.E.2d 896, 899 (Ind. Ct. App. 1974) (first district); *Daniels v. State*, 312 N.E.2d 890, 893 (Ind. Ct. App. 1974) (second district).

On the other hand, a number of factors may weigh against this interpretation of the *Hardin* opinion. The Indiana Supreme Court did not, in fact, dwell upon this point at all. Its primary purpose in writing the opinion was to discuss the issue concerning the sufficiency of evidence. In addition, the court did not cite or overrule its own earlier opinion in *Martin v. State*,⁸⁰ which held that a defendant has a right to counsel at any post-arrest identification other than an immediate or on-the-scene confrontation. Finally, the *Hardin* case involved only the latter type of confrontation which occurred shortly after the robbery. The statement in *Hardin* may then only be dictum since the defendant had no right to counsel even under the *Martin* decision. In fact, the court of appeals noted that an immediate confrontation was involved in the case and that, for this reason as well, the defendant had no right to counsel.⁸¹

The foregoing cases considered the issue of a defendant's right to counsel at a pretrial lineup, but a number of other cases were considered by the Indiana appellate courts which were concerned with the alleged "suggestiveness" of identifications in violation of fundamental due process.⁸² These cases recognized that identification procedures are improper when unduly suggestive, such as when a witness is improperly permitted to view a suspect through a one-way mirror while the suspect is seated alone at a police station,⁸³ but they emphasized that such improper identifications do not affect the rights of a defendant as long as the witnesses identifying the defendant at the trial have an independent basis for their in-court identifications.

In two somewhat related cases, the Indiana appellate courts also considered the propriety of identifications made at an arraignment and during a trial. In *Ballard v. State*,⁸⁴ the victim of a burglary appeared at the defendant's arraignment and identified him as the person involved in the offense. Thereafter, at the trial, the defendant attempted to exclude the victim's in-court identification, contending that it was tainted by the suggestiveness of the identification procedures at the prior arraignment. The Second District Court of Appeals avoided the critical issue concerning the arraign-

⁸⁰279 N.E.2d 189, 190 (Ind. 1972).

⁸¹287 N.E.2d at 360. See also *LeFlore v. State*, 299 N.E.2d 871, 875-76 (Ind. Ct. App. 1973).

⁸²*Frasier v. State*, 312 N.E.2d 77, 80 (Ind. 1974); *Lawson v. State*, 306 N.E.2d 150, 151-52 (Ind. Ct. App. 1974); *LeFlore v. State*, 299 N.E.2d 871, 876 (Ind. Ct. App. 1973).

⁸³See *Lawson v. State*, 306 N.E.2d 150, 511-12 (Ind. Ct. App. 1974).

⁸⁴309 N.E.2d 817, 822 (Ind. Ct. App. 1974). This question was also considered in *James v. State*, 297 N.E.2d 485 (Ind. Ct. App. 1973), but the court concluded that the defendant had waived the issue by failing to raise it properly at the trial stage.

ment proceeding by finding that an independent basis existed for the later in-court identification. In *Emerson v. State*,⁸⁵ the Indiana Supreme Court was confronted with an even more difficult question. During the trial, a witness was unable to identify the defendant until the trial court, at the prosecutor's request, directed the defendant to stand. Although the supreme court did not condone the procedure, it concluded that the witness had a sufficient independent basis for the identification to permit the testimony to be given.

2. *Photographic Identifications*

Both the United States Supreme Court⁸⁶ and the Indiana Supreme Court⁸⁷ held early last year that a defendant has no right to have his attorney present when police officers display photographs to a witness for identification purposes. In view of these decisions, most of the photographic identification cases during the past year were concerned with the alleged use of impermissible suggestive identification procedures in violation of fundamental due process.⁸⁸ The courts generally held, however, that the in-court identifications were properly admitted because, from a consideration of the totality of the circumstances, they were found to have a sufficient basis independent of any alleged suggestive pretrial procedure. In addition, the supreme court emphasized that a defendant who asserts that an improper photographic identification occurred has the burden of showing not only that the identification occurred but also the suggestive nature of the procedure.⁸⁹

C. *Confessions*

1. *Miranda Requirements*

A number of warnings must be given to a suspect undergoing custodial interrogation, according to the decision of the United States Supreme Court in *Miranda v. Arizona*,⁹⁰ and thus officers conducting interrogations may, on occasion, overlook or forget to

⁸⁵305 N.E.2d 435 (Ind. 1974).

⁸⁶United States v. Ash, 413 U.S. 300 (1973). See also *Neil v. Biggers*, 409 U.S. 188 (1972); *Simmons v. United States*, 390 U.S. 377 (1968).

⁸⁷*Parsley v. State*, 300 N.E.2d 652 (Ind. 1973); *Sawyer v. State*, 298 N.E.2d 440 (Ind. 1973).

⁸⁸*Calvert v. State*, 312 N.E.2d 925 (Ind. 1974); *Boys v. State*, 304 N.E.2d 789 (Ind. 1973); *Manns v. State*, 299 N.E.2d 824 (Ind. 1973); *Caywood v. State*, 311 N.E.2d 845 (Ind. Ct. App. 1974); *Carpenter v. State*, 307 N.E.2d 109 (Ind. Ct. App. 1974); *Hutts v. State*, 298 N.E.2d 487 (Ind. Ct. App. 1973).

⁸⁹*Parsley v. State*, 300 N.E.2d 652 (Ind. 1973).

⁹⁰384 U.S. 436 (1966).

give one or more of the required warnings. The Second District Court of Appeals finally confronted this issue in *Cooper v. State*⁹¹ and concluded that the failure to give each and every one of the warnings may not necessarily be a fatal error under the circumstances of a given case. In the *Cooper* case, the defendant was arrested for receiving stolen property. After being advised of his rights, he admitted that he knew the property was stolen. At his trial, he objected to the admissibility of this statement because he had not been advised of his right to the appointment of counsel if unable to afford counsel of his own choosing. Since he had employed an attorney after the interrogation and had never asked the trial court to appoint counsel for him, the court of appeals concluded that he was not an indigent and thus could not have been harmed by the lack of a warning of this nature.⁹²

The Indiana appellate courts also decided two important cases during the past year concerning the necessity for the *Miranda* warnings. In *Luckett v. State*,⁹³ the Third District Court of Appeals emphasized the fact that the *Miranda* decision applies only to custodial interrogation by law enforcement officers and not to interrogations by an individual conducting his own private investigation into the theft of his property. On the other hand, the Indiana Supreme Court extended the application of the *Miranda* decision by holding in *Bridges v. State*⁹⁴ that a confession of a juvenile could not be used at a juvenile delinquency hearing because the juvenile's parents had not been advised along with the juvenile concerning his *Miranda* rights. In a unanimous opinion, the court held that this issue had been decided the previous year in *Lewis v. State*⁹⁵ despite the fact that only two of the five justices had so held in the *Lewis* case. In the *Lewis* case, the opinion for the court asserted that "a juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless both he and his parents or guardian were informed of his rights to an attorney and to remain silent."⁹⁶ Only two justices concurred in this assertion. Two other justices concurred in the result but filed an opinion emphasizing that they did so because the *Lewis* case was a criminal trial. They insisted that they did not agree with the assertion that the rule

⁹¹301 N.E.2d 772 (Ind. Ct. App. 1973).

⁹²In *Michigan v. Tucker*, 94 S. Ct. 2357 (1974), the United States Supreme Court considered this question but, in effect, avoided reaching a definitive conclusion because the interrogation in question occurred before the effective date of the *Miranda* decision.

⁹³303 N.E.2d 670 (Ind. Ct. App. 1973).

⁹⁴299 N.E.2d 616 (Ind. 1973).

⁹⁵288 N.E.2d 138 (Ind. 1972).

⁹⁶*Id.* at 142.

should be applied to juvenile hearings.⁹⁷ The fifth justice dissented without an opinion, and this could mean that he would not have applied the rule even in criminal trials. In any event, the *Lewis* decision thus was conclusive only as to criminal trials involving juveniles. Since the *Bridges* case involved a juvenile arrested for the possession of marijuana, it is possible that the Indiana Supreme Court justices decided to extend the *Lewis* ruling at least to cover any juvenile hearing that involved an act of delinquency which would have been a crime if committed by an adult. If so, then the court may still conclude that the *Lewis* ruling does not apply to neglect and dependency hearings or to delinquency hearings involving an act of delinquency which would not be a crime if committed by an adult.⁹⁸

Finally, there were two important decisions during the past year concerning the burden of proof to be applied in determining the voluntariness and admissibility of a confession. In *Burton v. State*,⁹⁹ the Indiana Supreme Court appeared to resolve the question by stating the following:

The state, according to *Miranda*, has a "heavy burden . . . to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination." We have adopted this standard in past decisions. *Nacoff, supra*; *Dickerson v. State* (1972), Ind., 276 N.E. 2d 845. The issue, therefore, before this Court, is whether the state met its "heavy burden," i.e., proved beyond a reasonable doubt that the confession was voluntarily given.¹⁰⁰

Although the opinion suggests that the issue had been resolved by earlier cases, this suggestion is not supported by the cited cases. The cases of *Nacoff v. State*¹⁰¹ and *Dickerson v. State*¹⁰² both referred to the "heavy burden" involved in deciding whether a defendant waived his privilege against self-incrimination, but neither decision went so far as to say that this involved the standard of proof beyond a reasonable doubt as suggested by the *Burton* case. In fact, no cases are cited in the *Burton* case in support of this suggestion, and the opinion does not consider earlier contrary decisions of the

⁹⁷*Id.* at 143.

⁹⁸Compare *Warner v. State*, 254 Ind. 209, 258 N.E.2d 860 (1970), in which the court held that the preponderance standard of proof may be used in all juvenile hearings except those involving an act of delinquency which would have been a crime if committed by an adult. See also *In re Winship*, 397 U.S. 358 (1970).

⁹⁹292 N.E.2d 790 (Ind. 1973).

¹⁰⁰*Id.* at 797-98.

¹⁰¹256 Ind. 97, 267 N.E.2d 165, 167 (1971).

¹⁰²276 N.E.2d 845, 849 (Ind. 1972).

United States Supreme Court and the Indiana Court of Appeals. In *Lego v. Twomey*,¹⁰³ the Supreme Court held that the United States Constitution required no more than a preponderance standard in such cases. This standard appears to have been adopted by the Third District Court of Appeals which quoted the *Lego* opinion at length in *Ramirez v. State*,¹⁰⁴ including the statement concerning the preponderance standard, although the court of appeals did not specifically state that it was adopting the standard.

The First District Court of Appeals may have concluded in *Apple v. State*,¹⁰⁵ decided during the past year, that *Burton* did not in fact resolve the question concerning the burden of proof. In the *Apple* case, the court of appeals referred to the *Burton* case and stated that the question to be decided in determining the voluntariness of a confession is "whether, looking at all the circumstances, the confession was free and voluntary, and not induced by any violence, threats, promises, or other improper influence."¹⁰⁶ The court of appeals then applied this standard without in any way commenting upon the preponderance standard or the standard of proof beyond a reasonable doubt. This may indicate that the court of appeals disagreed with the statement in the *Burton* case or that the court was uncertain concerning the meaning and effect that should be given to the statement.

2. Unlawful Detention

The *Apple* court also considered the effect of a lengthy detention upon the admissibility of a confession. In that case, the defendant was arrested on a charge of burglary and apparently was kept in detention for several hours before being taken before a magistrate. After approximately twenty-six hours of detention, the defendant sent word to the police officers that she wanted to make a statement, and she did so after being fully advised of her rights. Thereafter, she was taken before a court for the first time, but the exact time is not stated in the opinion. She then argued at her trial that the confession was inadmissible because it was obtained more than six hours after her arrest and the delay in taking her before a court was not caused by the distance to the nearest judge or the availability of means of transportation to the nearest court. This argument was based upon a literal interpretation of the Indiana statute concerning the admissibility of confessions,¹⁰⁷ but the First

¹⁰³404 U.S. 477 (1972).

¹⁰⁴286 N.E.2d 219, 221-22 (Ind. Ct. App. 1972).

¹⁰⁵304 N.E.2d 321 (Ind. Ct. App. 1973).

¹⁰⁶*Id.* at 326.

¹⁰⁷IND. CODE § 35-5-5-3 (IND. ANN. STAT. § 9-1636, Burns Supp. 1974).

This section ends with the proviso that

District Court of Appeals rejected the interpretation. The court held that a delay of more than six hours is only one factor to be considered in determining the admissibility of a confession and that a confession obtained during such a delay is admissible under the statute if it is found to be a voluntary confession. In so doing, the court upheld the validity of the Indiana statute by noting that it was almost identical to similar federal provisions¹⁰⁸ which have been upheld by various federal courts.¹⁰⁹

This statute was also considered somewhat summarily by the Third District Court of Appeals during the past year in *Crawford v. State*.¹¹⁰ In that case, the defendant was arrested without a warrant on a charge of robbery, was interrogated, and gave a written confession within two hours after the arrest. The defendant was thereafter kept in custody by the police for five days until a charging affidavit was filed against him, and he was not brought into court until fourteen days had elapsed from the time of his arrest. He filed a motion to suppress the confession, but the motion was denied after a pretrial hearing. The defendant thereafter made no objection to the admissibility of the confession when offered at his trial. In fact, his attorney affirmatively stated that he had no objections to the confession. Although the court of appeals held that the issue had been waived by the failure to object at the trial, it did observe that there was no violation of the statute since the confession had been given during the first two hours of the detention. The court thus indicated that a post-confession delay is not to be considered in determining whether a confession obtained within the permitted statutory time is admissible at a trial.

D. Guilty Pleas

A specific and detailed procedure concerning guilty pleas was codified and enacted into law during the 1973 session of the Indiana General Assembly.¹¹¹ Although this statutory procedure was mentioned in two cases this past year,¹¹² the cases before the Indiana appellate courts during the past year involving guilty pleas gener-

the time limitation contained in this section shall not apply in any case in which the delay in bringing such person before a judge beyond such six-hour period is found by the trial judge to be reasonable, considering the means of transportation and the distance to be traveled to the nearest available judge.

¹⁰⁸18 U.S.C. § 3501(c) (1970).

¹⁰⁹See 304 N.E.2d at 323-25 and cases cited therein.

¹¹⁰298 N.E.2d 22 (Ind. Ct. App. 1973).

¹¹¹IND. CODE §§ 35-4.1-1-2 to -6 (IND. ANN. STAT. §§ 9-1203 to -1207, Burns Supp. 1974).

¹¹²*Boles v. State*, 303 N.E.2d 645, 656 (Ind. 1973) (DeBruler, J., dissenting); *Bonner v. State*, 297 N.E.2d 867, 871 nn.1-3, 877 (Ind. Ct. App. 1973).

ally involved pleas that were entered prior to the enactment of the statutory procedure. Despite this fact, the decisions by and large reflect the law as it is specified in the new statute.

The primary concern of the appellate courts continues to focus on the warnings given to a defendant and the record that must be made to establish that a guilty plea is made voluntarily. This concern is also reflected in the new statute which includes a detailed list of warnings that must be given to a defendant¹¹³ and a specific procedure for determining the voluntariness of a plea.¹¹⁴ In *Bonner v. State*,¹¹⁵ the Second District Court of Appeals discussed the procedures at length, emphasizing that a defendant must be advised of his rights with much the same specificity as that required under *Miranda v. Arizona*¹¹⁶ for persons undergoing custodial interrogation. The court, relying on earlier cases as well as the American Bar Association Standards for Criminal Justice and the provisions of the new Indiana statute,¹¹⁷ summarized the requirements for the taking of a guilty plea. It observed that the defendant must be advised as to the nature of the crime, the constitutional consequences of his guilty plea, and the nature of the punishment. The court then set aside the defendant's guilty plea because he was not advised of his right to confrontation and his right against compulsory self-incrimination. These two warnings, along with a warning concerning the right to a jury trial, were considered absolute minimum requirements by the court. The Third District Court of Appeals likewise set aside the plea in *Taylor v. State*¹¹⁸ because the trial record did not show that the defendant was advised as to the nature of the offense and the possible punishment for the offense.

These cases are generally in accord with the provisions of the Indiana statute, but another recent case raises a question about the completeness of the statutory procedure despite the legislature's attempt to be specific in codifying the procedure. In *Boles v. State*,¹¹⁹ the question is raised as to the necessity for a warning that a court may have no authority to suspend a sentence in a given case. The Indiana statute provides that the defendant must be informed of the "maximum possible sentence and minimum sentence for the offense charged and of any possible increased sentence by reason of the fact of a prior conviction or convictions, and of any possibility

¹¹³IND. CODE §§ 35-4.1-1-2, -3 (IND. ANN. STAT. §§ 9-1203, -1204, Burns Supp. 1974).

¹¹⁴*Id.* §§ 35-4.1-1-4, -5 (IND. ANN. STAT. §§ 9-1205, -1206).

¹¹⁵297 N.E.2d 867, 874 (Ind. Ct. App. 1973). See also *Thomas v. State*, 306 N.E.2d 136 (Ind. Ct. App. 1974).

¹¹⁶384 U.S. 436 (1966).

¹¹⁷297 N.E.2d 867, 871-72 (Ind. Ct. App. 1973).

¹¹⁸297 N.E.2d 896 (Ind. Ct. App. 1973).

¹¹⁹303 N.E.2d 645 (Ind. 1973).

of the imposition of consecutive sentences"¹²⁰ but makes no mention of a warning concerning the impossibility of suspending a sentence. The court divided evenly on this issue, and the meaning of the decision is unclear since the opinion can be interpreted to mean that the justices disagreed over the adequacy of the warning given, not over the necessity of the warning. Nevertheless, the opinion suggests that the statutory procedure may be incomplete and points up the difficulty encountered when the legislature attempts to be specific and to codify procedural matters.

Other aspects of the Indiana statute were also reflected in various decisions during the past year. A number of cases emphasized that the trial court must advise the defendant of his rights and cannot rely upon the defense attorney to give such advice.¹²¹ The Second District Court of Appeals recognized the duty of the trial court to determine that a factual basis exists for a guilty plea and to make a record of that finding.¹²² The Indiana Supreme Court emphasized that the trial judge should warn a defendant that the court is not bound by any agreements between the prosecutor and the defense and should permit the defendant to withdraw his plea if the court decides not to follow the terms of any agreement.¹²³ The supreme court also emphasized that a petition for post-conviction relief, not a motion to correct errors, is the proper way to challenge a plea of guilty after a sentence has been pronounced.¹²⁴ On the other hand, the Third District Court of Appeals declined to enforce the procedural requirement of a post-conviction relief petition and set aside a guilty plea following the filing of a motion to correct errors. The court recognized the correct procedure but concluded that it was required to grant relief when a fundamental error was apparent on the face of the record before it.¹²⁵

Finally, the appellate courts considered a number of issues not specifically covered by the Indiana statute. A number of cases recognized the authority of a trial judge to reject a guilty plea when the defendant says that he cannot remember what occurred or de-

¹²⁰IND. CODE § 35-4.1-1-3(d) (IND. ANN. STAT. § 9-1204(d), Burns Supp. 1974).

¹²¹Goode v. State, 312 N.E.2d 109, 112 (Ind. Ct. App. 1974); Thomas v. State, 306 N.E.2d 136, 139 (Ind. Ct. App. 1974); Bonner v. State, 297 N.E.2d 867, 877 (Ind. Ct. App. 1973).

¹²²Love v. State, 306 N.E.2d 142, 148 (Ind. Ct. App. 1974). See IND. CODE § 35-4.1-1-4(b) (IND. ANN. STAT. § 9-1205(b), Burns Supp. 1974).

¹²³Watson v. State, 300 N.E.2d 354 (Ind. 1973). See IND. CODE § 35-4.1-1-6(c) (IND. ANN. STAT. § 9-1207(c), Burns Supp. 1974).

¹²⁴Crain v. State, 301 N.E.2d 751 (Ind. 1973). See IND. CODE § 35-4.1-1-6(c) (IND. ANN. STAT. § 9-1207(c), Burns Supp. 1974).

¹²⁵Goode v. State, 312 N.E.2d 109 (Ind. Ct. App. 1974).

nies an essential element of the offense.¹²⁶ On the other hand, the Indiana Supreme Court held that a trial judge may accept a guilty plea when the defendant denies guilt, provided that there is a clear showing that the plea is entered knowingly and voluntarily and is accompanied by sufficient evidence to show a factual basis for the plea.¹²⁷

The Second District Court of Appeals decided one other case of major significance, although the decision is not completely clear in some particulars. In *Ballard v. State*,¹²⁸ the defendant was charged with robbery, first degree burglary, and automobile banditry. As the result of plea negotiations, the various charges were dismissed and the defendant entered a plea of guilty to second degree burglary. After beginning to serve a two to five year sentence for the second degree burglary conviction, the defendant filed a petition to withdraw his guilty plea. The plea was set aside, but the state then reinstituted the robbery charge and the first degree burglary charge against the defendant. After a trial and a conviction on both charges, the defendant was sentenced to serve ten to twenty-five years for the robbery conviction and two to five years on the first degree burglary charge. The court of appeals affirmed this action of the trial court on the theory that the defendant had completely rescinded the bargain by withdrawing his guilty plea, but the court emphasized the fact that the defendant was not retried for the same offense for which he was originally sentenced.¹²⁹ Thus the opinion leaves some doubt as to whether the state may reinstitute an original charge after the defendant has entered a plea to a lesser included offense.¹³⁰ Furthermore, the opinion did not indicate clearly whether or not the trial court was limited to the two to five year sentence on the burglary charge although the opinion would suggest that the trial court was not so limited.

E. Assistance of Counsel

1. Right to Counsel

In *Russell v. Douthitt*,¹³¹ the Indiana Supreme Court reluctantly concluded that a defendant is entitled to a "regular full-blown trial" with the assistance of counsel when involved in a parole revocation hearing. The court reached this conclusion after considering the decision of the United States Supreme Court in *Gagnon v. Scar-*

¹²⁶*Parsons v. State*, 304 N.E.2d 802, 808 (Ind. Ct. App. 1973); *Knight v. State*, 303 N.E.2d 845, 846 (Ind. Ct. App. 1973); *Nicholas v. State*, 300 N.E.2d 656, 661 (Ind. Ct. App. 1973).

¹²⁷*Boles v. State*, 303 N.E.2d 645, 654 (Ind. 1973).

¹²⁸309 N.E.2d 817 (Ind. Ct. App. 1974).

¹²⁹*Id.* at 827.

¹³⁰For a further discussion of this subject, see 7 IND. L. REV. 761 (1974).

¹³¹304 N.E.2d 793, 794 (Ind. 1973).

pell,¹³² although the *Gagnon* Court had concluded that the right to counsel should be determined on a "case-by-case" basis. The difference in the opinions was based upon the Indiana court's concern that a "case-by-case" approach would create uncertainty as to the law since no decision concerning the right to counsel would be final until received by either the Indiana Supreme Court or the United States Supreme Court. As a result, the Indiana court decided to resolve this uncertainty by concluding that a parolee is entitled to counsel in every parole revocation hearing.

Shortly after the *Russell* decision, the First District Court of Appeals was confronted with a similar issue concerning a probation revocation proceeding. In *Lazzell v. State*,¹³³ the defendant's probation was revoked after a hearing which was conducted without the defendant being represented by counsel. The defendant filed a petition for post-conviction relief after the revocation and argued that he should have had the assistance of an attorney during the revocation hearing. This argument was rejected by the court of appeals on the ground that the defendant had failed to show how the "use of the lawyer's skills of developing facts" would have been helpful since the issues in the hearing were "relatively simple."¹³⁴ The court did note the *Russell* decision, however, and suggested that the *Russell* decision might eventually be extended to probation revocation proceedings as well.¹³⁵

2. Effectiveness of Counsel

The Indiana appellate courts considered a number of cases during the past year involving the alleged ineffectiveness of trial counsel.¹³⁶ The great majority of these cases were resolved by the application of Indiana's standard test that an attorney is presumed to be competent and the presumption can be overcome only by strong and convincing proof that the attorney's actions or inactions rendered the proceedings a mockery of justice and shocking to the conscience of the court.¹³⁷ Few appellants were able to overcome this presumption.¹³⁸

¹³²411 U.S. 778 (1973).

¹³³305 N.E.2d 884 (Ind. Ct. App. 1974).

¹³⁴*Id.* at 885.

¹³⁵*Id.* at 885-86.

¹³⁶For a further discussion of this subject, see Note, *Effectiveness of Counsel in Indiana: An Examination of Appellate Standards*, 7 IND. L. REV. 674 (1974).

¹³⁷*Payne v. State*, 301 N.E.2d 514 (Ind. 1973); *Haddock v. State*, 298 N.E.2d 418 (Ind. 1973); *Pettit v. State*, 310 N.E.2d 81 (Ind. Ct. App. 1974); *Tibbs v. State*, 303 N.E.2d 294 (Ind. Ct. App. 1973); *Sargeant v. State*, 299 N.E.2d 219 (Ind. Ct. App. 1973).

¹³⁸Post-conviction relief was granted in only two cases because of the inadequacy of counsel, but special circumstances existed in each case. In

In *Graham v. State*,¹³⁹ the defendant was convicted of second degree murder and argued that his attorney was not given adequate time for preparation. The attorney was appointed on the morning of the defendant's trial and consulted with the defendant for only twenty minutes prior to the trial. Despite these facts, however, the Indiana Supreme Court denied post-conviction relief because the record showed that the defendant waived his rights when he insisted on a trial after the trial judge repeatedly offered him a continuance. The supreme court did not discuss the presumption of competency under these circumstances and in fact observed that the limited amount of preparation, "without more, would unhesitatingly lead this Court to the conclusion that the right to effective counsel was impaired by lack of adequate preparation where the crime charged is murder."¹⁴⁰ This observation could mean that the court would consider a murder trial a mockery of justice and shocking to the conscience of the court when the defense attorney prepared for only twenty minutes, or the observation might suggest that the court would apply a different standard when confronted with a case involving an attorney's lack of preparation. At least one judge has taken the latter approach. In *Daniels v. State*,¹⁴¹ the dissenting judge suggested that inadequacy of pretrial preparation should not be weighed in light of what the attorney did or did not do during the trial but should be viewed in light of the constitutional right to consult with an attorney prior to trial. This approach was rejected by the majority of the court, however, which concluded that the presumption of competency had not been overcome by the alleged lack of preparation prior to trial.¹⁴²

F. Insanity

1. Mental Competency

Following the two landmark decisions in 1972 concerning Indiana's insanity procedures,¹⁴³ the 1974 Indiana General Assembly *Chandler v. State*, 300 N.E.2d 877 (Ind. 1973), the court granted relief in part because the defendant's attorney was subsequently disbarred for reasons that reflected on his general competence as an attorney. In *Simmons v. State*, 310 N.E.2d 872 (Ind. 1974), the court granted the defendant permission to file a belated motion to correct errors because his appointed public defender failed to file a timely motion and admitted to the court that he had failed to do so even though the defendant had requested him to do so several times.

¹³⁹303 N.E.2d 274 (Ind. 1973).

¹⁴⁰*Id.* at 275.

¹⁴¹312 N.E.2d 890, 895-96 (Ind. Ct. App. 1974) (White, J., dissenting).

¹⁴²In *Sargeant v. State*, 299 N.E.2d 219 (Ind. Ct. App. 1973), the court also applied the presumption and concluded that the presumption was not overcome by the defendant's showing of inadequate preparation.

¹⁴³*Jackson v. Indiana*, 406 U.S. 715 (1972); *Wilson v. State*, 287

enacted new statutory procedures for determining a defendant's mental competency.¹⁴⁴

a. *Procedure prior to trial*

The new statute modified the earlier procedure in a number of ways, but the primary change was in the time limit concerning a defendant's commitment under the statute. A defendant may now be committed under the criminal procedure for a maximum period of only nine months and must be released if he has not regained his competency and if civil commitment proceedings have not been instituted against him within that period of time.¹⁴⁵ The new statute, however, does not resolve all the questions concerning the procedure to be followed, including a number of issues considered by the Indiana appellate courts during the past year.

The new statute retains the language of the former statute which requires a mental competency hearing whenever a judge "has reasonable ground for believing the defendant to be insane."¹⁴⁶ This language gives little guidance to the trial judge who must decide when to hold such a hearing and the language also confuses the question of mental competency with the issue of insanity. In *Parsons v. State*,¹⁴⁷ the Second District Court of Appeals held that a hearing on mental competency is required only if the defendant's competence has been "substantially questioned."¹⁴⁸ This case thus gives some added meaning to the "reasonable ground" standard in the statute, but the case also illustrates the confusion that can arise from the failure of the statute to distinguish between competency issues and insanity issues. The defendant did not plead insanity prior to his trial as required by statute¹⁴⁹ but testified at his trial that he was drinking at the time of the alleged burglary and did not recall the events alleged to have taken place. On appeal, he argued that the trial court had a duty to inquire into his sanity at the time of the alleged offense after being put on notice by the testimony concerning intoxication. Instead of holding that the defendant had waived any defense of insanity by failing to file the required pretrial notice of intent to rely on the defense, the court of appeals examined the statute concerning mental competency and

N.E.2d 875 (Ind. 1972). For a discussion of these cases, see Kerr, *Criminal Procedure, 1973 Survey of Indiana Law*, 7 IND. L. REV. 112, 142-45 (1973).

¹⁴⁴IND. CODE §§ 35-5-3.1-1 to -5 (IND. ANN. STAT. §§ 9-1708 to -1712, Burns Supp. 1974).

¹⁴⁵*Id.* § 35-5-3.1-5 (IND. ANN. STAT. § 9-1712).

¹⁴⁶*Id.* § 35-5-3.1-1 (IND. ANN. STAT. § 9-1708).

¹⁴⁷304 N.E.2d 802 (Ind. Ct. App. 1974).

¹⁴⁸*Id.* at 809.

¹⁴⁹IND. CODE § 35-5-2-1 (IND. ANN. STAT. § 9-1701, Burns Repl. 1956).

held that the trial court had no duty to hold a hearing because the defendant's competence had not been "substantially questioned" by the evidence of intoxication. The court also added the observation that "Parsons has failed to show that his alcoholism made him unaware of the wrongfulness of his conduct or compelled him to behave in that manner—the requirements which would entitle him to use insanity as a defense."¹⁵⁰ By so doing, the court suggested that a defense of insanity might properly have been considered despite the fact that the defendant had failed to file the required notice. If so, then the court is in disagreement with two other decisions handed down during the past year. In *Hollander v. State*,¹⁵¹ the Third District Court of Appeals held that pretrial notice is a necessary prerequisite for a defense of insanity and that a trial court has no discretion to admit evidence of insanity during the trial in the absence of such notice, even in a non-jury trial. In *Evans v. State*,¹⁵² decided shortly after *Hollander*, the Indiana Supreme Court held that an issue of mental competency cannot be waived but observed that there is "no legal reason why, in the case of a competent defendant, the defense of insanity should be viewed as a non-waivable defense."¹⁵³

The new statute also retains, although with somewhat different language, the provision of the former statute which authorized a hearing on competency at any time prior to the submission of the case to the court or jury trying the case.¹⁵⁴ The *Evans* case emphasized that this statute must give way to the need for a competency hearing at any time information justifying such a hearing is brought to the court's attention, even if after the trial and the sentencing of a defendant. This decision was relied upon by the Third District Court of Appeals in *Schmidt v. State*,¹⁵⁵ but the court added a procedural requirement which was not included in the new statute. In the *Schmidt* case, the defendant filed a petition to be examined under the criminal sexual deviancy statute¹⁵⁶ prior to being sentenced. After the examination, the two court-appointed psychiatrists reported that he was not a criminal sexual deviant but expressed the opinion that he was mentally incompetent at the time of his trial. The defendant filed a motion to vacate his conviction, and this motion was considered by the trial court at the same time it heard the testimony on the petition under the criminal sexual devi-

¹⁵⁰304 N.E.2d at 809-10.

¹⁵¹296 N.E.2d 449 (Ind. Ct. App. 1973).

¹⁵²300 N.E.2d 882 (Ind. 1973).

¹⁵³*Id.* at 887.

¹⁵⁴*See* IND. CODE § 35-5-3.1-1 (IND. ANN. STAT. § 9-1708, Burns Supp. 1974).

¹⁵⁵307 N.E.2d 484 (Ind. Ct. App. 1974).

¹⁵⁶IND. CODE § 35-11-3.1-3 (IND. ANN. STAT. § 9-4003, Burns Supp. 1974).

ancy statute. After hearing the testimony, the trial judge denied both motions but stated in the record that he had observed the defendant during the trial and that the defendant appeared to be fully competent at that time. In reversing this decision, the court of appeals concluded that the testimony of the psychiatrists during the sexual deviancy hearing was sufficient to require a separate hearing on the issue of competency. The court then added that it would be proper for the trial judge to testify at such a hearing concerning his observations of the defendant during the trial but that he should then disqualify himself as judge in the competency hearing and follow the proper procedure for appointing a special judge for the hearing.

b. Procedure after acquittal

The new statute has made a major change in the statutory procedures affecting a defendant acquitted by virtue of insanity. Under the former statutory procedures, the trial court would make a further determination concerning the defendant's sanity at the time of the trial and the probability of the recurrence of an attack of insanity, and the defendant could then be committed until mental health authorities concluded that his sanity had been restored or that the recurrence of an attack of insanity was improbable.¹⁵⁷ The new statute provides that the trial court is to make a further determination concerning the defendant's sanity at the time of the trial, but only for the purpose of deciding whether the defendant is to be retained in custody until civil commitment proceedings can be instituted. The court is authorized to take judicial notice of all the evidence introduced during the trial; the court is authorized to detain the defendant in custody until the hearing; and the court is also authorized to detain the defendant after the hearing if the court finds by a preponderance of the evidence that the defendant is mentally incompetent and dangerous to himself or to others. If there is a finding of incompetency, the court is to direct the Department of Mental Health to institute civil commitment proceedings.¹⁵⁸ This statute has not yet been reviewed by any court, and no cases were decided by the Indiana appellate courts during the past year concerning the prior statutory procedures.

2. Insanity Defense

The statute discussed above does not directly relate to the defense of insanity since it is concerned primarily with the procedures

¹⁵⁷*Id.* §§ 35-5-3-1, -2-4 (IND. ANN. STAT. §§ 9-1704a, -1705, Burns Repl. 1956).

¹⁵⁸*Id.* § 35-5-3-3.2-1 (IND. ANN. STAT. § 9-1713, Burns Supp. 1974).

to be followed after an acquittal. Nevertheless, the statute contains a provision which may indirectly affect the defense of insanity. Under the statute, a court is required to conduct a mental competency hearing after "a defendant is found not guilty by reason of mental disease or defect, within the definition" of Indiana Code section 16-14-9-1.¹⁵⁹ The cited statute defines "mental illness" and "psychiatric disorders" for purposes of civil commitments and includes any "mental deficiency, epilepsy, alcoholism, or addiction to narcotic drugs."¹⁶⁰ If the new criminal statute includes this reference in order to broaden the definition of the insanity defense, then it is clearly contrary to the definition adopted in *Hill v. State*¹⁶¹ in 1969 and reaffirmed by the Indiana Supreme Court during the past year in *Fuller v. State*.¹⁶² The more likely interpretation is that the statute does not change the definition of insanity for purposes of the insanity defense but merely points to the civil commitment standard which is to be the guide for determining the disposition of persons acquitted by virtue of the insanity defense.

Another question has arisen during the past year concerning the insanity defense and the continued validity of the statutory procedures concerning the defense. The 1973 Indiana General Assembly adopted two provisions that could be interpreted so as to eliminate the statutory procedures which require a pretrial notice of intent to rely upon the defense of insanity and establish the procedures for examining a defendant after such notice has been filed.¹⁶³ The first of these provisions abolished all pleas "in abatement or in bar" except pleas of guilty and not guilty;¹⁶⁴ the second added the provision that "any matter of defense may be proved under the plea of not guilty," except as otherwise expressly provided.¹⁶⁵ Although it might be argued that these provisions abolished the requirement of a pretrial notice concerning the insanity defense, the 1973 statute did not specifically repeal the statutes concerning such notice¹⁶⁶ and the exception quoted above should be

¹⁵⁹*Id.*

¹⁶⁰*Id.* § 16-14-9-1 (Burns 1973).

¹⁶¹252 Ind. 601, 251 N.E.2d 429 (1969).

¹⁶²304 N.E.2d 305, 310-11 (Ind. 1973). The standard adopted by the Indiana Supreme Court is the modified version proposed by the American Law Institute. Under this standard, a person is not responsible for criminal conduct "if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Id.* at 310.

¹⁶³IND. CODE §§ 35-3-2-1, -2 (IND. ANN. STAT. §§ 10-3042, -3043, Burns Supp. 1974).

¹⁶⁴*Id.* § 35-4.1-2-(a) (IND. ANN. STAT. § 9-1101(a)).

¹⁶⁵*Id.* § 35-4.1-1-1(b) (IND. ANN. STAT. § 9-1202(b)).

¹⁶⁶Ind. Pub. L. No. 325, § 5 (April 23, 1973).

sufficient to provide for the continued validity of the earlier statutes. As noted previously, the Third District Court of Appeals emphasized during the past year that a pretrial notice is a necessary prerequisite for a defense of insanity, and the court reached this conclusion from a review of both the statutory procedures and the earlier common law authorities on the subject, although the case did arise prior to the enactment of the 1973 statute.¹⁶⁷

G. *Habitual Criminal Prosecutions*

For the second consecutive year, the Indiana Supreme Court decided two major cases concerning Indiana's habitual offender statutes. During 1972, the court limited the use of the habitual criminal statute by carefully defining the meaning of a "second" and a "third" offense under the statute¹⁶⁸ and revised the nature of habitual criminal proceedings by requiring a two-stage trial for such proceedings.¹⁶⁹ In *Enlow v. State*,¹⁷⁰ the court reviewed its ruling concerning a two-stage trial and concluded that the ruling applied at least to all other cases pending on direct appeal at the time the ruling was made. In the *Enlow* case, the defendant had been convicted under the habitual criminal statute in a one-stage jury trial held in 1954. No appeal was taken at the time, but the defendant petitioned the trial court in October of 1972 for permission to file a belated motion to correct errors. This petition was filed within a month after the ruling requiring a two-stage trial, and the petition was granted by the trial court. The motion to correct errors, however, was ultimately denied by the trial court. On appeal, the Indiana Supreme Court held that the defendant was entitled to a two-stage trial and reversed the habitual criminal conviction. Because the issue was before the court on a belated appeal, the court held that two-stage trials would be required for all cases on direct appeal after September 11, 1972, the date of the ruling requiring such proceedings. At the same time, the court reviewed the general principles concerning the retrospective application of new decisions and concluded that these principles would probably require a retrospective application of the ruling to other cases as well.¹⁷¹

¹⁶⁷*Hollander v. State*, 296 N.E.2d 449, 452 (Ind. Ct. App. 1973).

¹⁶⁸*Cooper v. State*, 284 N.E.2d 799 (Ind. 1972). In the *Cooper* case, the court held that a person may be prosecuted under the habitual criminal statute, IND. CODE § 35-8-8-1 (IND. ANN. STAT. § 9-2207, Burns Repl. 1956), only when the person has committed a second felony subsequent to conviction and imprisonment for a first felony and has committed a third felony subsequent to conviction and imprisonment for the second felony.

¹⁶⁹*Lawrence v. State*, 286 N.E.2d 830 (Ind. 1972).

¹⁷⁰303 N.E.2d 658 (Ind. 1973).

¹⁷¹*Id.* at 660.

A somewhat related issue was also considered by the Indiana Supreme Court in *State ex rel. Van Natta v. Rising*.¹⁷² In the *Rising* case, the defendant's operators license was revoked because he had been convicted three times of driving while under the influence. Under the habitual traffic offenders statute,¹⁷³ the prosecutor initiated a civil proceeding to revoke the defendant's license after the defendant's third criminal conviction for the driving offense. Although the statute authorizes the revocation as a result of prior criminal proceedings, the Indiana Supreme Court concluded that the statutory proceeding is civil rather than criminal in nature. Despite this distinction, the court still found it necessary to discuss the proceeding in terms of the criminal law. The court first noted that the habitual traffic offenders statute provided for a separate revocation hearing after the third criminal conviction and thus complied with the due process requirement of a two-stage trial for "similar criminal proceedings."¹⁷⁴ The court then held that the statute was not *ex post facto* even though it added revocation to the penalties that accompanied the three prior criminal convictions. In so doing, the court emphasized that the revocation was not an additional punishment for the criminal act but was an exercise of the police power for the protection of the public. The court reached this conclusion despite the fact that the statute was enacted in 1972 and two of the defendant's convictions occurred prior to 1972. In this regard, the court reverted almost completely to criminal law considerations. It held that the legislature did not add any additional burden or punishment for the defendant's prior crimes but actually created a completely new crime for which the penalty is imposed—"the act of driving while intoxicated by one twice convicted of driving while intoxicated."¹⁷⁵ This interpretation may indicate that the court could apply a similar interpretation to the habitual criminal statute despite some earlier cases that have said the statute does not impose a punishment for an additional crime but for the status or condition of being an habitual criminal.¹⁷⁶ The interpretation is important because it has been at the center of the controversy concerning the constitutionality of the statute.¹⁷⁷

¹⁷²310 N.E.2d 873 (Ind. 1974).

¹⁷³IND. CODE § 9-4-13-1 (Burns Supp. 1974).

¹⁷⁴310 N.E.2d at 874.

¹⁷⁵*Id.*

¹⁷⁶*Bernard v. State*, 248 Ind. 688, 696, 230 N.E.2d 536, 541 (1967); *Smith v. State*, 237 Ind. 532, 536, 146 N.E.2d 86, 88 (1957), *cert. denied*, 357 U.S. 909 (1958).

¹⁷⁷*See United States ex rel. Smith v. Dowd*, 271 F.2d 292 (7th Cir. 1959), *cert. denied*, 362 U.S. 978 (1960).

H. Sentencing

1. Proportionality of Sentences

The Indiana constitution provides that all penalties must be "proportioned to the nature of the offense,"¹⁷⁸ and this provision was litigated frequently during the past year. In a number of cases, sentences for the offense of entering to commit a felony were reduced from a term of one to ten years to a term of one to five years.¹⁷⁹ Although the applicable statute provides for a term of one to ten years,¹⁸⁰ this sentence has been found disproportionate because entering to commit a felony is included within the greater offense of second degree burglary and the latter offense carries a penalty of only two to five years.¹⁸¹ A similar result was reached in a number of other cases with reference to robbery and armed robbery,¹⁸² but these cases all arose prior to the enactment of the current statute on armed robbery which was enacted by the General Assembly in 1971 to make the sentences proportionate.¹⁸³ Although the courts in these cases, in effect, determined the length of the permissible sentences, they reaffirmed their authority to do so under this constitutional provision while recognizing that the legislature is still vested with the sole authority to prescribe the punishment for crimes.¹⁸⁴

Disproportionality of sentences, as discussed in the foregoing cases, is found when the maximum penalty for a lesser included offense exceeds the maximum penalty for the greater offense or when the minimum penalty for the lesser offense exceeds the minimum penalty for the greater offense.¹⁸⁵ At the same time it has been held

¹⁷⁸IND. CONST. art. 1, § 16.

¹⁷⁹Clinton v. State, 305 N.E.2d 897 (Ind. Ct. App. 1973); Maynard v. State, 301 N.E.2d 200 (Ind. Ct. App. 1973); Gullett v. State, 299 N.E.2d 190 (Ind. Ct. App. 1973).

¹⁸⁰IND. CODE § 35-13-4-5 (IND. ANN. STAT. § 10-704, Burns Repl. 1956).

¹⁸¹Lee v. State, 286 N.E.2d 840, 843 (Ind. 1972); Easton v. State, 280 N.E.2d 307 (Ind. 1972); Heathe v. State, 274 N.E.2d 697 (Ind. 1971).

¹⁸²Knight v. State, 303 N.E.2d 845 (Ind. Ct. App. 1973); LeFlore v. State, 299 N.E.2d 871 (Ind. Ct. App. 1973). Both of these cases considered the minimum penalties under the applicable statutes.

¹⁸³IND. CODE § 35-12-1-1 (IND. ANN. STAT. § 10-4709, Burns Supp. 1974). In Jennings v. State, 297 N.E.2d 909 (Ind. Ct. App. 1973), the court considered an issue concerning the maximum penalty under the same statute, but this case arose in 1965 and the issue involved in it was resolved by a statute in 1969 which was carried forward in part into the 1971 enactment.

¹⁸⁴Clark v. State, 311 N.E.2d 439 (Ind. Ct. App. 1974); Hamblen v. State, 299 N.E.2d 211 (Ind. Ct. App. 1973); Gullett v. State, 299 N.E.2d 190 (Ind. Ct. App. 1973).

¹⁸⁵These rules have essentially been codified in the provisions of IND. CODE § 35-4.1-4-6 (IND. ANN. STAT. § 9-2201b, Burns Supp. 1974), enacted during the 1973 session of the General Assembly.

during the past year that the maximum penalty for a lesser included offense may be equal to, though not greater than, the maximum penalty for the greater offense.¹⁸⁶ Furthermore, the courts reaffirmed the view that a sentence is not disproportionate merely because of the possibility that a person serving an indeterminate sentence for a lesser included offense might serve more time than a person given a determinate sentence for a greater offense.¹⁸⁷

2. *Accessories and Accomplices*

In *Schmidt v. State*,¹⁸⁸ the Indiana Supreme Court held that the defendant, who was convicted as an accessory to first degree murder, was entitled to have her conviction and sentence reduced when the other person charged with the offense was thereafter convicted only of being an accessory after the fact to manslaughter. The court agreed that the latter person was the only possible person who could have been the principal to the crime for which the defendant was convicted as an accessory, and the court ordered her conviction and sentence reduced to conform with that of the principal. By way of contrast, the Indiana Supreme Court held only a few months earlier that an accessory was not entitled to have his conviction and sentence for second degree burglary reduced after the principal was permitted to plead guilty to the lesser offense of malicious trespass.¹⁸⁹ In so doing, the court held that the accessory's conviction and sentence are dependent upon the outcome of the principal's case only when the principal is in fact tried and convicted or acquitted.

3. *Criminal Sexual Deviancy*

The Indiana Court of Appeals decided two important cases during the past year concerning the criminal sexual deviancy statute.¹⁹⁰ In *Stiles v. State*,¹⁹¹ the First District Court of Appeals held that the trial court did not abuse its discretion in refusing to com-

¹⁸⁶*Emery v. State*, 301 N.E.2d 369 (Ind. 1973); *Brown v. State*, 301 N.E.2d 189 (Ind. 1973); *Clark v. State*, 311 N.E.2d 439 (Ind. Ct. App. 1974).

¹⁸⁷*Hamblen v. State*, 299 N.E.2d 211 (Ind. Ct. App. 1973); *Davis v. State*, 297 N.E.2d 450 (Ind. Ct. App. 1973); *Barbee v. State*, 296 N.E.2d 884 (Ind. Ct. App. 1973). It was held in *Clark v. State*, 311 N.E.2d 439, 441 (Ind. Ct. App. 1974), that an indeterminate sentence is not cruel and unusual punishment and is not an unconstitutional delegation of judicial authority to prison authorities.

¹⁸⁸300 N.E.2d 86 (Ind. 1973).

¹⁸⁹*Combs v. State*, 295 N.E.2d 366 (Ind. 1973).

¹⁹⁰IND. CODE § 35-11-3.1-1 (IND. ANN. STAT. § 9-4001, Burns Supp. 1974).

¹⁹¹298 N.E.2d 19 (Ind. Ct. App. 1973). See also *Berwanger v. State*, 307 N.E.2d 891, 899 (Ind. Ct. App. 1974).

mit the defendant for treatment as a criminal sexual deviant despite the fact that reports from the examining physicians recommended commitment. The court of appeals emphasized that the statute authorizing commitment states that the trial court "may determine the question of criminal sexual deviancy in accordance with such findings,"¹⁹² using the word "may" instead of the word "shall." It concluded that the trial court should be reversed only for an arbitrary abuse of discretion since the statute placed no limits upon the exercise of such discretion.

In *Berwanger v. State*,¹⁹³ the Second District Court of Appeals held that the defendant was not entitled to an evidentiary hearing on his petition to be declared a criminal sexual deviant because his petition was supported only by his own request for such a hearing and was unaccompanied by any other evidence or statement of a qualified physician placing his mental condition in serious question. The court of appeals also held that the defendant's lack of counsel during his mental examination was not reversible error in the absence of any showing of prejudice. The court, recognizing that the statute provides for a right to counsel,¹⁹⁴ encouraged all trial courts to afford reasonable notice to counsel concerning such examinations, but concluded that the statute does not mandate the presence of an attorney. In so holding, the court emphasized that the right to counsel is strictly a statutory right and that no such constitutional right exists to have an attorney present at a mental examination.¹⁹⁵

4. Drug Abuse Treatment

In *McNary v. State*,¹⁹⁶ the Third District Court of Appeals emphasized that the 1971 drug abuser rehabilitation statute¹⁹⁷ is mandatory in requiring a trial court to provide a convicted defendant with the opportunity for treatment if the defendant qualifies under the statute. Under the statute, the trial court is required to send the defendant to the Department of Mental Health for an examination once a showing is made that the defendant is qualified. There is no requirement, however, that the Department must accept the defendant for more than an examination. The Department is to determine whether the defendant is in fact a drug abuser and whether he is likely to be rehabilitated through treatment and then

¹⁹²IND. CODE § 35-11-3.1-17 (IND. ANN. STAT. § 9-4017, Burns Supp. 1974).

¹⁹³307 N.E.2d 891 (Ind. Ct. App. 1974).

¹⁹⁴IND. CODE § 35-11-3.1-7 (IND. ANN. STAT. § 9-4007, Burns Supp. 1974).

¹⁹⁵307 N.E.2d at 894.

¹⁹⁶297 N.E.2d 853 (Ind. Ct. App. 1973).

¹⁹⁷IND. CODE § 16-13-6.1-1 (Burns Supp. 1974), *as amended by* Ind. Pub. L. No. 59 (Feb. 18, 1974).

is to recommend whether the defendant should be placed on probation for purposes of treatment. Since the defendant in the *McNary* case qualified under the statute, the trial court improperly denied his petition for an examination by the Department of Mental Health. The court in *McNary* did not discuss the applicability of the holding to cases in which such a petition is submitted prior to the defendant's conviction. Since the same statute provides for an election of treatment by drug abusers charged with or convicted of crimes, however, it would appear that the *McNary* ruling would apply in both types of cases.

5. "Good Time" and Credit for Pretrial Confinement

The 1974 Indiana General Assembly extensively rewrote the prior statute regarding the effect of "good time" in reducing sentences of confinement. Under the new statute,¹⁹⁸ the director of the division of classification of the department of corrections is directed to classify each prisoner in the custody of the department into one of four categories. This classification determines the rate by which "good time" reduces each prisoner's term of confinement. A classification committee is required to review each classification periodically, and a hearing procedure is established in connection with the review if the committee should recommend the demotion of a prisoner to a lower classification. The committee may also, following appropriate procedures set forth in the statute, deprive a prisoner of "good time" already earned under the provisions of the law. The holding in *Begley v. State*,¹⁹⁹ in which the First District Court of Appeals upheld the authority of the parole board to extend a prisoner's sentence by the length of time that the prisoner was away from the prison during an escape and subsequent imprisonment in a federal prison, would appear to be consistent with the terms of the new statute.

In *Lee v. State*,²⁰⁰ the Third District Court of Appeals, relying upon a 1972 statute,²⁰¹ held that a prisoner is entitled to credit on his sentence for the total amount of time served in pretrial confinement from the time of his arrest on a charge until his sentencing for that offense. It should be noted that this statutory requirement still exists although the 1974 General Assembly repealed a statute which was substantially similar to the one relied upon in the *Lee* case.²⁰²

¹⁹⁸IND. CODE § 11-7-6.1-2 (Burns Supp. 1974).

¹⁹⁹299 N.E.2d 238 (Ind. Ct. App. 1973).

²⁰⁰297 N.E.2d 890 (Ind. Ct. App. 1973).

²⁰¹IND. CODE § 35-8-2.5-1 (IND. ANN. STAT. § 9-1828, Burns Supp. 1974).

²⁰²The 1973 General Assembly enacted IND. CODE § 35-4.1-4-16(a) (IND. ANN. STAT. § 9-1828a, Burns Supp. 1974) which was substantially the same

6. *Resentencing after Revocation of Probation*

During the past year, the Indiana Supreme Court was confronted with two challenges to the statute which permits a court, after a probation violation, to set aside the defendant's original sentence and impose any sentence which was available at the time of the original conviction.²⁰³ In *Nicholas v. State*,²⁰⁴ the statute withstood an attack based on the theory that the defendant was actually being resentenced for a purported crime of violating his probation.²⁰⁵ In the other case, *Smith v. State*,²⁰⁶ the statute withstood a challenge based upon a double jeopardy argument. In that case, the defendant was given a suspended sentence of imprisonment for one year for carrying a pistol without a license. After violating the terms of his probation, he was resentenced to serve a term of ten years in prison. In rejecting the defendant's argument that this increased sentence violated his right not to be placed in double jeopardy, the court held that a more severe penalty could be imposed if justified by the defendant's conduct from the time of the first sentencing to the time of the resentencing.²⁰⁷ Here the more severe penalty was justified by the probation violation, the uttering of a forged instrument.

VIII. Evidence—Civil

*Marshall J. Seidman**

A. *Demonstrative Evidence*

1. *Admissibility of Photographs*

In *Richmond Gas Corp. v. Reeves & Reinke*,¹ the Indiana Court of Appeals dealt with the power of the trial court to exclude photographic evidence. The case resulted from a series of violent explosions which killed forty-one persons in downtown Richmond, Indi-

as *id.* § 35-8-2.5-1 (IND. ANN. STAT. § 9-1828, Burns Supp. 1974). Because of this duplication, the 1974 General Assembly repealed the 1973 statute. See Ind. Pub. L. No. 147 (Feb. 19, 1974).

²⁰³IND. CODE § 35-7-2-2 (IND. ANN. STAT. § 9-2211, Burns Supp. 1974).

²⁰⁴300 N.E.2d 656 (Ind. 1973).

²⁰⁵*Id.* at 664.

²⁰⁶307 N.E.2d 281 (Ind. 1974).

²⁰⁷See *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969).

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¹302 N.E.2d 795 (Ind. Ct. App. 1973).

ana. Photographs showing damage to a building following a gas explosion in Terre Haute, Indiana, were introduced by the defendant gas corporation during cross-examination of one of plaintiff's expert witnesses. The key issue at trial was whether the explosion was a gas explosion, as argued by the plaintiff, or a gunpowder explosion as advocated by the defendant. The examiner stated that he wished to use the photographs during cross-examination of plaintiff's witness to test the witness' credibility as to the distinctions between the two types of explosions. The plaintiff objected on the grounds that admission of these photographs would raise questions of conditions and circumstances at a different time and place from the one at issue and would thereby lead to confusion of the jury and to pursuit of a collateral issue. The objection was sustained. Subsequently, the examiner, through his own expert witness, again attempted to introduce the photographs to illustrate "brisance,"² a factor in determining the type of explosion. The plaintiff reiterated his objection and the judge once again refused to admit the photographs into evidence.

The court of appeals stated that admission and exclusion of photographic evidence is within the discretion of the trial judge, and his decision will not be overturned unless an abuse of discretion is shown. The court found no such abuse and stated that photographs should be admitted only when they might enlighten a jury. Photographs are improper, however, when they are a potential source of confusion or distraction. The court concluded that the admission of photographs illustrating another explosion which occurred under different conditions and circumstances could have confused and misled the jury.³ Thus, the potential for delay of the trial, distraction of the jury, and introduction of collateral issues adequately justified the trial court's exclusion of the photographs. Furthermore, when a jury has been adequately informed by the testimony of an expert, it should be within the court's discretion to exclude questionable demonstrative evidence.

²Brisance is the "relatively shattering effect resulting from the detonation of various types of explosives. This effect is measured by experts and considered as a factor in arriving at an opinion as to the cause of the explosion." *Id.* at 799 n.1.

³This holding involves a fusion of two branches of evidentiary law—that of demonstrative evidence and of relevancy. The court followed the accepted balancing rule in disallowing the admittance of relevant photographs. The commonly accepted counterbalancing factors which may cause a court to exclude relevant evidence are that the evidence may unduly arouse the jury's prejudices, distract the jury, consume an undue amount of time, and involve the danger of unfair surprise. See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 185, at 439-40 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]. See also Proposed Fed. R. Evid. 403, 56 F.R.D. 183, 218 (1972).

The same court reached an opposite result from the *Richmond Gas* case in *Smith v. Indiana State Board of Health*.⁴ *Smith* involved an appeal from an interlocutory order that granted a temporary injunction prohibiting a rock festival in Warrick County. During the trial the State was permitted, over objection, to introduce photographs of rock festivals held in other locations. The evidentiary purpose was to show the trial judge the nature and effect of a rock festival. The pictures from the other rock festivals showed members of the audience trafficking in illegal drugs, engaging in sexual intercourse, and littering the grounds. The defendant argued that the photographs of other rock festivals were inadmissible since the other festivals occurred at different times and in different locations. Significantly, the State had failed to show a similarity in the planning, promotion, and preparation of the other festivals and the proposed festival.

As in *Richmond Gas*, the court of appeals stated that the admission of photographs of similar acts, occurrences, or transactions rests in the discretion of the trial court and will not be disturbed unless an abuse of discretion is shown.⁵ The court, without explanation, did not find any abuse of discretion and indicated the admission of the photographs would, at most, be considered harmless error. Significantly, the hearing was before a judge and not a jury. The trial judge, therefore, without prejudice, could consider the exhibits and determine their propriety and weight in relation to legal and evidentiary principles. Despite the supposed ability of a judge to overlook the prejudicial aspects of such photographs, his neutrality in a case arousing such widespread public interest is still questionable. The *Smith* case may be criticized for not dealing adequately with this possibility.

2. Polygraph Tests

In *Freeman v. Freeman*,⁶ a mother appealed when the trial court refused to terminate a father's visitation rights. The mother alleged that the father had sexually molested their daughter. Apparently, a polygraph test taken by the father was introduced into evidence either by stipulation of the parties or by the mother with-

⁴307 N.E.2d 294 (Ind. Ct. App. 1974).

⁵The initial question seems to be one of relevancy, rather than one of counterbalancing the adverse effects of admission. McCormick states that proof of the existence of habit may justify the introduction of evidence of other specific instances, so long as the other instances are not too few or too many in number, are near in time, and involve sufficiently similar circumstances. MCCORMICK § 195, at 465. See also Proposed Fed. R. Evid. 406, 56 F.R.D. 183, 223 (1972).

⁶304 N.E.2d 865 (Ind. Ct. App. 1973).

out objection from the father.⁷ The results of the test suggested that the father's denials of sexual molestation were not truthful. The court of appeals affirmed the admittance of the test results and stated that such results are not conclusive⁸ but are only one facet of all the evidence to be weighed by the finder of fact. In civil cases, courts should be more receptive to polygraph tests and these tests should be admitted after a proper foundation has been laid, and, in jury trials, only with cautionary instructions.

*Robinson v. State*⁹ foreshadows the ultimate use of polygraph evidence in Indiana trials when there is an absence of stipulation in a civil case or a waiver of objections in a criminal case. The court stated that a qualified examiner, using proven techniques, might someday be able to produce evidence so reliable as to be admissible. This language should encourage counsel to utilize polygraph evidence favorable to their clients. Today, the qualifications of the examiners, the sophistication of the techniques, the psychological and physiological underpinnings of the examination, the technical quality of the instruments, and the experience gained in polygraph utilization should be sufficient to permit qualified and experienced operators to testify with as much assurance about the results of their testing as do other experts when questioned about results they achieved through testing.¹⁰

B. Impeachment by Prior Inconsistent Statements

In *Gradison v. State*,¹¹ a landowner appealed from a judgment awarding him \$140,000 for land condemned by the state for highway use. At the trial, the State produced the appraiser as a witness. On cross-examination, the witness denied making a previous statement that the land was worth a certain sum. The landowner

⁷Indiana follows the minority view which allows the results of a polygraph test to be admitted by stipulation of the parties. See *People v. Houser*, 85 Cal. App. 2d 686, 193 P.2d 937 (1948). But see *Pulakis v. State*, 476 P.2d 474 (Alaska 1970); *Stone v. Earp*, 331 Mich. 606, 50 N.W.2d 172 (1951).

⁸The main reason for the exclusion of such evidence seems to be the fear of the judiciary that the trier of fact will place too much weight on this type of evidence. McCORMICK § 207, at 507.

⁹309 N.E.2d 833 (Ind. 1973). Cf. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In *Frye*, the court held that the requirement of scientific acceptance had not been met by polygraph tests. It is questionable whether this conclusion would be valid today.

¹⁰Burkey, *Privacy, Property and the Polygraph*, 18 LAB. L.J. 80 (1967); Horvath & Reid, *Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, 62 J. CRIM. L.C. & P.S. 276 (1971). The general consensus is that polygraph tests have an accuracy rate of eighty percent. McCORMICK § 207, at 506 n.9.

¹¹300 N.E.2d 67 (Ind. 1973).

then offered for impeachment purposes part of the land's appraisal report which the witness had previously prepared for the State. The pages tendered reflected the witness' valuation of the property based upon hypotheticals which resulted in a higher value for the land than the one given by the appraiser at trial. The result was not his ultimate opinion or even a statement of fact because, both in his direct testimony and in the report, he clearly rejected as too speculative the "income analysis" method of appraisal which the plaintiff sought to use in this case and which the witness had considered only hypothetically in his report. The trial judge excluded the offer as having no tendency to impeach.

The Indiana Supreme Court affirmed and stated that the proper procedure for impeaching a witness through prior inconsistent statements is to have the examiner lay a proper foundation by calling the witness' attention to the time when, the place where, and the person to whom the contradictory statement was alleged to have been made. The purpose of such a specific foundation is to alert the witness to the particular statement which the examiner deems inconsistent so that the witness may intelligently admit and explain the statement or deny it. Although this approach follows the traditional view, it would seem that such particularity for the foundation is not really necessary and unduly limits effective cross-examination. McCormick criticizes the traditional view for this reason and suggests it is particularly inappropriate when the witness is an expert.¹²

C. Hearsay

1. Admissions of a Party-Opponent

*Brattain v. Herron*¹³ involved an automobile accident in which the defendant driver's vehicle struck another vehicle resulting in the death of all the occupants of the other vehicle. The trial judge permitted plaintiffs to introduce, over defendant's objection, a cer-

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The purposes of the requirement are (1) to avoid unfair surprise to the adversary, (2) to save time, as an admission by the witness may make the extrinsic proof unnecessary, and (3) to give the witness, in fairness to him, a chance to explain the discrepancy. On the other hand, the requirement may work unfairly for the impeacher. He may only learn of the inconsistent statement after he has cross-examined and after the witness by leaving the court has made it impracticable to recall him for further cross-examination to lay the foundation belatedly. It is moreover a requirement which can serve as a trap since it must be done in advance before the final impeachment is attempted and is supremely easy to overlook.

MCCORMICK § 37, at 72.

¹³309 N.E.2d 150 (Ind. Ct. App. 1974).

tified copy of defendant's guilty plea to a criminal charge arising out of the same accident. This charge was that of causing the death of another while driving under the influence of intoxicating liquor.

A criminal *judgment* upon a plea of *not guilty* is generally inadmissible in a civil action, and this is especially true if the civil action is for damages resulting from the crime.¹⁴ This rule is premised upon the disparity between the parties to civil and criminal actions, the different standards of proof, and the nature and effect of civil and criminal trials. However, a *guilty plea* and a *resulting judgment* in a criminal case may be admissible in a civil action arising from the same conduct. The criminal record is admitted as an admission of a party-opponent rather than as a certification of facts contained therein.¹⁵ In *Brattain*, the court of appeals applied this rule and affirmed the trial court's decision to admit the plea.

2. Business Records

*American United Life Insurance Co. v. Peffley*¹⁶ involved an interesting application of the business records exception to the hearsay rule. The trial judge entered judgment for the deceased's second wife who was the beneficiary of a group life insurance policy issued by the defendant. The defendant claimed that the proceeds were properly payable to the first wife of the decedent, and the appeal was based upon the exclusion of evidence concerning an alleged change of beneficiary by the insured prior to his death.

The trial judge sustained plaintiff's objections to the introduction of the defendant company's form letter designating a new beneficiary, the company's form acknowledging receipt of a change card from the decedent, which certified the designated beneficiary to be the first wife, and another change form acknowledging a correction of the decedent's name. After presentation of the insurance company's case, the trial judge granted plaintiff's motion for judgment on the evidence. The probable basis for this decision was that

¹⁴*Cf.* Proposed Fed. R. Evid. 803(22), 56 F.R.D. 183, 303 (1972), which provides in part that evidence of a "final judgment, entered after a trial or upon a plea of guilty (but not on a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year" is not excluded by the hearsay rule. UNIFORM RULE OF EVIDENCE 63(20) is similar to proposed federal rule 803(22).

¹⁵*See generally* McCORMICK § 265. Significantly, the probative value of such an admission may be reduced by showing special circumstances or a satisfactory explanation for the guilty plea.

¹⁶301 N.E.2d 651 (Ind. Ct. App. 1973).

the original records of the insurance company demonstrated that plaintiff was the beneficiary. Furthermore, there was no acceptable evidence of a change of beneficiary since the original change of beneficiary card furnished to the deceased was not produced at the trial.

The Indiana Court of Appeals held that the three excluded documents tended to prove that such a card was received, and the carbon copies in the carrier's records were, therefore, relevant and admissible under the business records exception to the hearsay rule.¹⁷ The carrier laid an adequate foundation showing that the documents were prepared in the ordinary course of the carrier's business, that those documents were prepared upon receipt of a change card, and that they were prepared by an employee whose duty it was to type them and who had personal knowledge of the card's existence, receipt and content.¹⁸ The court further found that the best evidence rule did not bar the admission of the three internal documents since the parties stipulated that a diligent search for the original change card was conducted through the files of both the carrier and decedent's employer. Secondary evidence of a writing is admissible, therefore, if it has been shown that there was a diligent search for the original writing and that the original writing is unavailable.¹⁹

The court of appeals then considered whether the offer of decedent's policy, on which decedent had made a notation regarding the change of beneficiary, was hearsay. Judge Buchanan stated that the notation was hearsay since it constituted a declaration by dece-

¹⁷The common law exception to the hearsay rule for regularly kept business records had four elements:

(a) the entries must be original entries made in the routine of a business, (b) the entries must have been made upon the personal knowledge of the recorder or of someone reporting to him, (c) the entries must have been made at or near the time of the transaction recorded, and (d) the recorder and his informant must be shown to be unavailable. . . .

. . . Today, the inconvenience of calling those with firsthand knowledge and the unlikelihood of their remembering accurately the details of specific transactions convincingly demonstrates the need for recourse to their written records, without regard to physical inability.

McCORMICK § 306, at 720.

¹⁸See also UNIFORM RULE OF EVIDENCE 63(13); Proposed Fed. R. Evid. 803(3), 56 F.R.D. 183, 300 (1972). Both provide that the requisite foundation testimony may be furnished either by the custodian of the records or by other qualified witnesses.

¹⁹McCORMICK § 230, at 560, defines the original document rule as follows: "In proving the terms of a writing, where the terms are material, the original writing must be produced unless it is shown to be unavailable"

dent that he had changed beneficiaries and since it was offered to prove that fact. The view of the majority, however, differed with that of the opinion's author. Thus it was decided that Indiana should take a flexible approach with regard to exceptions to the hearsay rule and should allow the admission of any evidence if there is a "Circumstantial Probability of Trustworthiness and a Necessity for [its use]."²⁰ Both of these requirements were apparently met in the instant case. The decedent's copy of the policy was found among his effects in a logical place for its storage, and his writing was authenticated. Therefore, the element of trustworthiness was established. The loss of the original change of beneficiary card supplied the necessity for the use of the evidence.

The majority opinion in this case implicitly overruled prior cases²¹ by stating that all exceptions to the hearsay rule have not been finally determined. This holding should be commended since a contrary view would perpetuate the present status of the hearsay rule and its exceptions. The many exceptions to the hearsay rule indicate the substantial discontent which courts have demonstrated in applying the rule over the years, and it would be unwise to freeze these exceptions now for all time.

D. Discretion in the Admission of Evidence

In *Apple v. Apple*,²² the Indiana Court of Appeals again demonstrated that, in a bench trial, a judge has wide discretion in ruling on procedural and substantive evidentiary matters. The court commended the trial judge for his liberal admission of evidence and stated that such a policy would more easily determine the truth of all the facts. The court emphasized that, in this case, there was

²⁰301 N.E.2d at 658, *quoting from* 5 J. WIGMORE, EVIDENCE § 1420, at 202 (rev. ed. 1970). This would seem to conform with Proposed Fed. R. Evid. 803(24), 56 F.R.D. 183, 303 (1972), which allows hearsay evidence to be admitted if the statement has "circumstantial guarantees of trustworthiness." The comments to this rule state: "It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system."

One may only speculate as to why neither counsel nor the court suggested the state of mind exception to the hearsay rule. *See* Proposed Fed. R. Evid. 803(3), 56 F.R.D. 183, 300 (1972); MCCORMICK § 249; UNIFORM RULE OF EVIDENCE 63(12). *See also* Hinton, *States of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394 (1934). It could have been argued that the writings were admissible either to show the decedent's belief that the beneficiary had been changed or to show the intent of the decedent to change the beneficiary. *Cf.* *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892).

²¹*See, e.g.,* *Barger v. Barger*, 221 Ind. 530, 48 N.E.2d 813 (1943).

²²301 N.E.2d 534 (Ind. Ct. App. 1973).

no jury that might be prejudiced by admission of the evidence²³ and noted that a judge has complete control of the scope, extent, method, and manner of direct and cross-examination of all witnesses. Consequently, a judge's rulings in such a case will not be overturned except for an abuse of the wide discretion accorded him. Even if evidence is erroneously admitted, the appellate courts presume that trial judges, because of their experience, would adequately consider the propriety and weight of all of the evidence and would not rely on the erroneously admitted evidence in making their findings of fact and in drawing their conclusions of law. Thus, a reversal will only occur when a trial judge makes direct reference to his exclusive reliance on clearly inadmissible evidence.²⁴

Another example of the almost limitless powers of a trial judge as to evidentiary matters in a bench trial is found in *City of Indianapolis v. Medenwald*,²⁵ an eminent domain proceeding. Two of plaintiff's witnesses testified, over the City's objection, that the value of plaintiff's property had substantially deteriorated because the rights of ingress and egress were impaired. The Indiana Court of Appeals stated that, if this were the only evidence of value, the City would have been entitled to a reversal. The court found, however, that there was adequate testimony in the record from which the trial judge could determine value without regard to this evidence and stated that the decision of a trial judge will not be overturned if there is sufficient evidence of probative value to support it. The court of appeals further noted that, in a bench trial, a presumption arises that the trial judge only considers proper evidence in arriving at his judgment.

While these cases appear to allow trial judges some freedom to make evidentiary errors in bench trials, *State v. Maplewood Heights Corp.*²⁶ demonstrates that this freedom does not apply to evidentiary errors made by trial counsel. In this case, the State appealed from an award of damages for land condemned for a highway project. At trial, counsel for the State objected and moved to strike the valuation testimony of witnesses for the defendant

²³*Id.* at 539. In theory, the jury trial system of evidentiary admission governs in trials before the judge as well. Arguments concerning special rules for judge-trying cases, however, do exist. See Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A.J. 723 (1964); Davis, *Hearsay in Nonjury Cases*, 83 HARV. L. REV. 1362 (1970).

²⁴Indiana courts follow the majority rule. See *General Metals, Inc. v. Truitt Mfg. Co.*, 259 N.C. 709, 131 S.E.2d 360 (1963); *Lenahan v. Leach*, 245 Ore. 496, 422 P.2d 683 (1967). On the other hand, if the judge excludes admissible evidence, his ruling may well be reversed. See, e.g., *Kelly v. Wasserman*, 5 N.Y.2d 425, 158 N.E.2d 241, 785 N.Y.S.2d 538 (1959).

²⁵301 N.E.2d 795 (Ind. Ct. App. 1973).

²⁶302 N.E.2d 782 (Ind. 1973).

upon the grounds that their appraisal was predicated on the improper assumption that the land consisted of developed residential lots rather than of undeveloped land. The Indiana Supreme Court found this testimony inadmissible, but for different reasons from those cited by the State's counsel. The court stated in conclusory terms that the testimony was objectionable because it was speculative and likely to mislead the jury. Although this conclusion was in factual terms substantially the same as the original objection, the court stated that the correct grounds for the objection had not been made before the trial judge. The court emphasized that an objection varying from the one made at trial may not be urged upon appeal.²⁷

This case emphasizes the need for counsel to utilize specific rather than general objections. In addition, if counsel fails to advance among his several objections the correct one for the exclusion of the evidence, the trial judge's admission of the evidence will be sustained even though counsel subsequently comes upon a correct objection and presents it to the appellate court. Trial counsel, therefore, are charged with knowledge of the law of evidence and all of its intricacies. Trial judges, however, are not expected to exclude improper evidence unless trial counsel specifically and correctly call it to their attention. Obviously, this ruling places a significant burden upon trial counsel, while it lightens the burdens of trial judges.

The Proposed Federal Rules of Evidence, which are presently under consideration by Congress, move toward according trial judges the widest possible discretion in making evidential rulings,²⁸ and the Indiana cases show tentative steps in the same direction. This liberalizing trend seems appropriate and appellate judges should probably encourage trial judges to err on the side of admission rather than exclusion. Also, trial judges should be urged to prevent possible prejudicial situations in jury trials through the use of appropriate instructions. Even if a jury is unable to properly evaluate the evidence, the trial judge has ultimate judicial safeguards over the jury's actions either through granting a motion for a new trial or a motion for judgment notwithstanding the verdict.

²⁷This is the general rule. *People ex rel. Blackmon v. Brent*, 97 Ill. App. 2d 438, 240 N.E.2d 255 (1968); *Kroger Grocery & Baking Co. v. Harpole*, 175 Miss. 227, 166 So. 335 (1936). See *McCORMICK* § 52, at 117. Both Proposed Fed. R. Evid. 103(a)(1), 56 F.R.D. 183, 194 (1972), and UNIFORM RULE OF EVIDENCE 4 require that the specific ground for objection be stated at the trial.

²⁸See Proposed Fed. R. Evid. 103, 56 F.R.D. 183, 194 (1972).

E. Experts

1. Use of Authoritative Treatises

In *Miller v. Griesel*,²⁹ a student plaintiff appealed from a judgment for defendants in a suit for personal injuries brought against his teacher, his principal and the School City of East Gary. Griesel, the principal and a defense witness, testified on direct examination concerning certain rules that he had promulgated for classroom teachers. On cross-examination, plaintiff asked the trial judge to rule that the principal, on the basis of his training and experience, was an expert. The defendants objected. The trial judge declined to so rule because the principal was originally presented as a factual witness and not as an expert. The Indiana Court of Appeals' affirmation of the trial judge's ruling emphasizes that the trial judge determines whether a witness is qualified to testify as an expert, and his ruling will not be set aside on appeal unless there is an abuse of discretion.³⁰

The plaintiff next attempted, unsuccessfully, to continue his cross-examination of the principal by using an authoritative text. The court of appeals held that, while learned treatises are not admissible as independent evidence, they are permissible when used in cross-examining a witness who testifies as an expert. However, in the instant case, this form of cross-examination was improper because the trial judge had refused to qualify Griesel as an expert. The court held that, since Griesel was not offered as an expert witness on direct examination, he could not be qualified as such on cross-examination.

This is probably an unnecessarily rigid rule. There are no strong policy reasons why a witness cannot be demonstrated to be an expert and qualified as such by an opponent. The proponent should have no right to deprive a jury of expert testimony simply by offering a witness, who may be an expert, solely as a factual witness. As a matter of trial strategy, one should normally refrain from calling an opponent's witness, especially an opponent's expert witness who may be expected to cooperate fully with offering counsel. Although an attempt to qualify an opponent's witness as an expert so that his testimony may be used in support of one's own case is a gambit almost foredoomed to failure as a practical matter, as a theoretical matter it should not be objectionable.

²⁹297 N.E.2d 463 (Ind. Ct. App. 1973).

³⁰*Salem v. United States Lines Co.*, 370 U.S. 31 (1962); *Oborski v. New Haven Gas Co.*, 151 Conn. 274, 197 A.2d 73 (1964); *Hanson v. Christensen*, 275 Minn. 204, 145 N.W.2d 868 (1966). See *McCORMICK* § 13, at 29.

2. Scientific Evidence

*Beck v. Beck*³¹ concerned the admissibility of expert testimony regarding blood grouping test results used to establish nonpaternity in a divorce action. The trial court admitted the testimony and this was affirmed on appeal. The Indiana Court of Appeals noted that, although at common law it was conclusively presumed that any child born during wedlock was legitimate,³² the rule today is that the presumption may be rebutted by direct, clear and convincing evidence.³³

The court concluded that blood tests in divorce actions are admissible only if the tests are conducted by a qualified expert and only if they exclude paternity.³⁴ The court emphasized that the adversary system of justice is a means of arriving at the truth and that the modern rules of discovery, the procedures for pretrial hearings, and to some extent, the rules of evidence, are drawn to permit the case trier to hear all pertinent facts so that the truth may be more readily ascertained. In the instant case, not only were the results of the test exculpatory, but also the husband failed to accept the child as his own, denied paternity, and denied having sexual intercourse with his wife during the possible period of conception. Thus, the circumstances were such that to hold the results of the blood grouping test inadmissible would result in a travesty of justice.

The *Beck* case raised the interesting and yet unanswered question of whether the trier of fact could ever find a husband to be a child's father in disregard of admissible scientific blood tests and based solely upon the wife's testimony that she had sexual intercourse only with her husband during the period when she could medically have conceived. The result in the *Beck* case may indicate that the exclusion of scientific blood test evidence would be erroneous under such circumstances.³⁵

*Brattain v. Herron*³⁶ concerned blood sampling for alcoholic content. The driver of a car involved in a fatal accident was admitted to a hospital and examined by a physician who, upon police

³¹304 N.E.2d 541 (Ind. Ct. App. 1973).

³²9 J. WIGMORE, EVIDENCE § 2527 (3d ed. 1940).

³³McCORMICK § 211, at 520-21.

³⁴

Whenever medical science has perfected certain tests to the point where it can be said with almost medical certainty that something is a fact, the court should not hide in the dark ages and be bound by archaic rules which subvert the truth and impede the sound administration of justice.

304 N.E.2d at 545.

³⁵*Cf. Berry v. Chaplin*, 74 Cal. App. 2d 652, 169 P.2d 442 (1946).

³⁶309 N.E.2d 150 (Ind. Ct. App. 1974).

request, removed a blood sample. The doctor placed the sample in a vial provided by the officer, enclosed the vial in an envelope, closed it, signed it, dated it, and gave it to the officer to deliver to the state police laboratory. A test of the blood sample by the state police chemist revealed that it contained .197 percent alcohol, which constitutes legal evidence of intoxication in Indiana.³⁷ The defendant objected to the admission into evidence of the analysis of the blood sample on the ground that there was inadequate evidence of the chain of custody from the time of the taking of the sample by the physician in the hospital until its analysis by the chemist in the state police laboratory.³⁸ The chemist who made the analysis testified that the envelope containing the blood sample had not been opened and, when he opened it, the seal on the vial containing the blood was unbroken. The Indiana Court of Appeals found this sufficient to permit the fact finder to conclude that the specimen had not been tampered with and that it had been in continuous custody of the state police from the time it was handed to an officer at the hospital until it was examined in the state police laboratory by the chemist who determined its content.

F. Competency

In *Freeman v. Freeman*,³⁹ a mother appealed a denial of her petition requesting termination of the father's visitation rights. At the trial, upon direct examination, the grandmother was asked if her four year old grandchild had made a statement to her accusing the father of sexual advances. An objection to this question was sustained. The Indiana Court of Appeals held that the request to the grandmother to repeat the child's statement was an attempt to introduce the hearsay statement of a four year old child who was by statute incompetent to testify in her own right.⁴⁰ The court further held that the plaintiff's failure to make an offer of proof after the objection was sustained prevented review.

Although the trial judge found the child incompetent to testify in court, he found her sufficiently competent for the purposes of

³⁷IND. CODE § 9-4-1-56 (Burns 1973).

³⁸It has been suggested that less stringent chain of custody requirements should be applied in civil cases than are applied in criminal cases. *Woodby v. Hafner's Wagon Wheel, Inc.*, 22 Ill. 2d 413, 176 N.E.2d 757 (1961).

³⁹304 N.E.2d 865 (Ind. Ct. App. 1973).

⁴⁰IND. CODE § 34-1-14-5 (Burns 1973) provides that children under ten years of age shall not be competent witnesses "unless it appears that they understand the nature and obligation of an oath." (emphasis added). If the court meant that a four-year-old is presumptively incompetent, it was correct. However, even a four-year-old is competent if it appears affirmatively on the record that he understands the nature and obligation of an oath.

an ex parte interview in his chambers. A possible distinction in these conflicting competency findings can be drawn between the in-court and the in-chambers testimony. The courtroom testimony was being offered to prove the truth of the child's utterance while the testimony in the judge's chambers merely went to prove the child's state of mind. Significantly, the record of the trial court reflected the judge's conclusions derived from his interview with the child and stated that she loved both parents and feared neither parent. The court also placed ostensible reliance on the child's courtroom behavior when the child unhesitatingly ran to her father when released by the judge. The court therefore concluded that placing the child in the custody of the father would be acceptable. It seems appropriate that the trial record should reflect the substance of ex parte conversations and courtroom observations when those are used in making findings of fact. Trial judges, and appellate judges, might make their decisions more understandable by revealing rather than concealing their rationale.

*Blue v. Brooks*⁴¹ is exemplary of a correct, but frequently misunderstood, application of the hearsay rule. The Indiana Supreme Court specifically held that extra-judicial statements offered in court to prove the truth of the matters asserted therein are hearsay, but that such statements, if not offered to prove the facts asserted, are not hearsay. In *Brooks*, a divorce decree granted the custody of two minor children to the father. A modified decree, however, granted custody over one of the children to the mother. The father appealed and contended that the trial court committed error by excluding testimony of a child psychologist who had examined the children prior to trial. Specifically, the witness attempted to testify to statements made to him by the minor son concerning the boy's preference as to his parents. The trial court had sustained the wife's objection to this evidence because of its prejudicial aspects.

The supreme court, in *Brooks*, stated that the testimony would not be violative of the hearsay rule because it would not be offered to prove the truth of the facts asserted.⁴² The court, however, allowed the exclusion of the testimony because of its possible prejudicial impact. Emphasis was also placed on the propriety of preventing the psychologist from relating "second hand" information.

The exclusion of the testimony in this case is questionable. The children's statements could have been permitted if accompa-

⁴¹303 N.E.2d 269 (Ind. 1973).

⁴²MCCORMICK § 14, at 31, comments: "If an expert witness has first-hand knowledge of material facts, he may describe what he has seen, and give his expert inferences therefrom." But see Proposed Fed. R. Evid. 703, 56 F.R.D. 183, 283 (1972).

nied by a proper limiting instruction. Furthermore, the supreme court's reliance on the phrase "second hand" is unfortunate since it could mislead counsel by preventing a proper understanding of the hearsay rule. Thus, the supreme court did make a correct statement of the hearsay rule but failed to emphasize the harm of excluding valuable testimony when its prejudicial impact could substantially be cured by a limiting instruction.

G. *Cross-examination*

In *Jameson v. McCaffry*,⁴³ the plaintiff was the operator of a vehicle which was struck at a railroad crossing by defendant's train, allegedly because of a failure of the warning lights. A police officer called as a defense witness was cross-examined by plaintiff as to whether the plaintiff had been arrested for drunken driving or for public intoxication at the time of the collision. On redirect, the officer was asked by the defendant whether the plaintiff was charged with a traffic violation at that time. Over objection, the trial judge permitted the officer to testify that the plaintiff was charged with the offense of failure to obey warning lights. The Indiana Court of Appeals found that the plaintiff's cross-examination concerning an arrest for the named cause opened the door for defendant to question the officer concerning any arrests which were made.⁴⁴ The plaintiff had argued that his cross-examination, relating to arrests for intoxication, was limited to clarification of the officer's testimony on direct regarding alcohol associated with the plaintiff. Plaintiff argued, therefore, that the redirect should have been limited to crimes such as drunken driving. The court of appeals found this argument unconvincing and stated that, if error occurred, it was harmless error. The court enumerated a test for harmless error: assuming similar trial court circumstances, except the reversal of the evidentiary ruling, would the result have been different?

H. *Conclusion*

The past year demonstrated a slow but visible advance by the appellate courts of Indiana toward allowing trial judges greater discretion in evidentiary matters; a refusal to overturn even erroneous evidentiary decisions unless such evidence compelled a result different from that which would have been reached had the erro-

⁴³300 N.E.2d 889 (Ind. Ct. App. 1973).

⁴⁴McCORMICK § 32, at 64, states: "The reply to new matter drawn out on cross-examination is the normal function of the redirect, and examination for this purpose is a matter of right, though its extent is subject to control in the judge's discretion."

neous evidence been excluded; a willingness to permit more hearsay rule exceptions because of the need for the evidence and its probable reliability; an acceptance of scientific evidence such as blood grouping tests; and an indication that the results of polygraph tests taken under appropriate circumstances may be admissible in the near future. This survey indicates that evidential matters are not critical in leading to reversals in appellate litigation, and this is probably appropriate. This result reflects a belief that technical evidentiary errors made by trial judges should not be a basis for reversal when the result of the trial would not otherwise be changed. Errors are often made by a trial judge due to the myriad rulings on evidential points which must be made without the adequate opportunity for reflection and study afforded appellate judges. The appellate judges of Indiana have shown that they understand this reality in the trial of cases and have shaped the law of evidence to achieve substantial justice.

IX. Evidence—Criminal

*William Marple**

A. *Demonstrative Evidence*

1. *Bodily Invasions*

Two extremely important cases involving the obtaining of demonstrative evidence from the body of an accused reached results not entirely consistent with each other. The supreme court decided, over dissent, in *Adams v. State*,¹ that court-ordered surgery to remove bullet fragments from beneath the surface of the defendant's skin was an impermissible invasion of his fourth amendment rights. The defendant was arrested as a suspect in a supermarket robbery, during which it was believed that he had been wounded by a shot fired by the police. When he was apprehended several weeks later, the police officers observed two bullet wounds, and an X-ray examination showed metallic fragments in his flesh. The police filed an affidavit for the purpose of obtaining a search warrant to retrieve the bullets from his body. In addition to stating the

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¹299 N.E.2d 834 (Ind. 1973), *cert. denied*, 94 S. Ct. 1452 (1974). The denial of the petition for certiorari contained the notation that the judgment below rested upon an adequate state ground.

reasons for believing that the wounds contained bullets, the affidavit named the doctor who would perform the surgery and stated the doctor's opinion that the procedure was minor and would not harm the defendant.²

After surveying the United States Supreme Court decisions³ involving bodily searches, the court distinguished *Schmerber v. California*,⁴ which permitted a compulsory blood test and the admission of the results thereof. Whereas in *Schmerber* the bodily intrusion was characterized as minor, in *Adams*, the court was "confronted with an intrusion of the most serious magnitude."⁵ The court held that, although the introduction of the bullets into evidence did not violate defendant's constitutional privilege against self-incrimination, since this is a privilege only against *testimonial* compulsion,

²The affidavit contained a statement that a reliable confidential informer had told the affiant that Adams was one of the robbers who had been shot and that Adams had two bullet holes in him. It stated the informer's reliability and facts relating to the robbery. It did not, however, state facts explaining how the informant obtained his information. More importantly, the affidavit set forth the opinions of medical doctors that the fragments were bullets, named the doctor who would perform the operation, and stated that the fragments could be "quickly and easily removed from the tissue in a minor procedure . . . and that said procedure would involve no pain, discomfort, or risk" to the defendant. 299 N.E.2d at 841.

³In *Cupp v. Murphy*, 412 U.S. 291 (1973), the Court upheld a warrantless taking of evidence from under a suspect's fingernails. In *United States v. Dionisio*, 410 U.S. 1 (1973), and *United States v. Mara*, 410 U.S. 19 (1973), the Court held that a forced handwriting sample, and a coerced voice exemplar, respectively, did not violate the fourth amendment. All of the above intrusions were much more limited than the one in *Adams*. In *Rochin v. California*, 342 U.S. 165 (1952), the Court found a forced stomach pumping of an accused per se unreasonable, regardless of whether the evidence seized would be testimonial or demonstrative. This case was the basis for the holding in *Adams*.

⁴384 U.S. 757 (1966). In *Schmerber*, after the defendant's arrest, a blood sample to determine intoxication was taken at the direction of a policeman acting without a search warrant. The majority in *Adams* correctly pointed out that the decision in the *Schmerber* case was carefully limited by the following language:

The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions

Id. at 772.

⁵299 N.E.2d at 837. The court also relied on the earlier Indiana case of *Allredge v. State*, 239 Ind. 256, 156 N.E.2d 888 (1959), which permitted the use of a breathalyzer test only if there was no invasion of the defendant's body.

the surgery was, nevertheless, an unreasonable invasion of the defendant's body.⁶

Justice Prentice's dissent adduces the majority's improper reliance on *Rochin v. California*.⁷ In *Rochin*, the police entered the defendant's house, arrested him, and later had his stomach pumped—all without a warrant. In *Adams*, however, there was not only a prior judicial determination of probable cause to believe that the defendant had been involved in the robbery, but there was also probable cause to believe that evidence was embedded in the defendant's hip and that there was no danger to him in performing the operation. The dissent proposed that the accused be afforded a hearing on the questions of the seriousness of the operation and whether he might be injured by it.

It is difficult to imagine an instance in which physical evidence would be located inside the accused's body and its removal, following proper medical procedures, would be harmful to the accused. Indeed, it seems that in most cases, as in *Adams*, the surgery would be beneficial to the defendant. In any event, a prior hearing would guard against the danger, feared by the majority, that any sanctioning of surgical invasions might lead to radical explorations such as lobotomies or open heart surgery. The hearing should be adversarial in nature, as opposed to the ex parte application for a warrant in *Adams*. Otherwise, the defendant would have no opportunity to present reasons why the operation might be harmful.

Prior to the *Adams* decision, the court of appeals in *Foxall v. State*⁸ upheld the forceable removal, with the aid of a shoehorn, of foil packets from the suspect's mouth. Police officers searched Foxall's apartment pursuant to a warrant and found a television set which matched the description of one listed in the warrant. After placing Foxall under arrest, one of the officers noticed him attempting to place something in his mouth. A struggle ensued during which the suspect suffered three broken ribs, a bruised lip, and a slight injury to one eye. Two of the police officers were bitten but, with the aid of the plastic shoehorn, several packets of heroin were removed from Foxall's mouth.

The defendant relied on *Rochin* to challenge the introduction of this evidence against him. The court of appeals noted two impor-

⁶Even under the majority view, nothing would prevent a witness from testifying about the marks and scars he observed on the defendant's body. In *Ross v. State*, 204 Ind. 281, 182 N.E. 865 (1932), the court stated that testimonial incrimination only results from the "employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place of other evidence." *Id.* at 292-93, 182 N.E. at 869 (emphasis in original).

⁷342 U.S. 165 (1952).

⁸298 N.E.2d 470 (Ind. Ct. App. 1973).

tant factors which distinguished *Foxall* from *Rochin*. In *Rochin*, the search was conducted without a warrant and was illegal from its inception. However, in *Foxall*, the search followed an arrest which occurred during the orderly execution of a valid search warrant.⁹ More significantly, the narcotics in *Rochin* were removed from the defendant's stomach through the use of a stomach pump while, in the present case, the heroin was merely taken from Foxall's mouth.¹⁰

Since there was no surgical invasion of defendant's body, the *Foxall* case is not expressly contrary to *Adams*.¹¹ Although Foxall suffered harm, it was a result of his resistance to the legally executed search; the harm from swallowing the heroin could have been much greater, even fatal, to him. So long as a search is valid and so long as the force used does not amount to outright brutality of a shocking nature, the police should be allowed to prevent the imminent destruction of incriminating evidence.

2. Tape Recordings

In *Layton v. State*,¹² the supreme court explained that the requirements for admitting a tape recording, as set forth in *Lamar v. State*,¹³ were met even though the tape-recorded version of the defendant's pre-trial confession did not contain the necessary warnings of rights. The *Lamar* court held, as one of five criteria to estab-

⁹Although Foxall challenged the search warrant, which was based on information from an undisclosed informant, the court found that the warrant met the requirements of *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964); and IND. CODE § 35-1-6-2 (IND. ANN. STAT. § 9-602, Burns Repl. 1956), all of which deal with the standards for the proper issuance of a warrant based upon hearsay.

A recent United States Supreme Court case made clear that there are two levels at which a fourth amendment violation may occur—upon the initial seizure of the person which brings him into contact with government agents, and upon the subsequent search for and seizure of evidence. *United States v. Dionisio*, 410 U.S. 1, 8 (1973). In *Rochin*, the initial seizure of the person was illegal, so the Court did not need to consider the question of the seizure of the evidence inside Rochin's stomach.

¹⁰The court of appeals cited three cases from other jurisdictions which reached the same result on very similar facts. *United States v. Harrison*, 432 F.2d 1328 (D.C. Cir. 1970); *People v. Tahtinen*, 210 Cal. App. 2d 755, 26 Cal. Rptr. 864 (1962), *cert. denied*, 375 U.S. 842 (1963); *State v. Santos*, 101 N.J. Super. 98, 243 A.2d 274 (1968).

¹¹Language in *Allredge v. State*, 239 Ind. 256, 156 N.E.2d 888 (1959), would seem to prohibit any physical invasion of a suspect's body to which the suspect does not consent. However, in the recent case of *Brattain v. Herron*, 309 N.E.2d 150, 158 (Ind. Ct. App. 1974), the court stated that *Allredge* was "distinguished, if not overruled" by *Adams*.

¹²301 N.E.2d 633 (Ind. 1973).

¹³282 N.E.2d 795 (Ind. 1972), *noted in Evidence*, 1973 *Survey of Indiana*

lish a foundation for the admission of a tape recording, that all required warnings be given and all necessary waivers of constitutional rights be obtained.¹⁴ Further, the *Lamar* court noted that it would be preferable for the warnings and waivers to be present on the tape as well as on the written documents.¹⁵ The *Layton* court, however, stated that the medium through which the necessary waiver must be obtained was not delimited by *Lamar* and refused to extend the earlier case to require that the tape reflect the warnings and waiver.¹⁶ Since the court found that Layton's confession was voluntary, the tape of the confession and the written transcript were properly admitted.

The *Layton* result is questionable. Added protection would be given to both the accused and the State if the warnings and waivers were required to be on the tape. In this manner, the State could conclusively establish that the warnings were given and the waiver obtained. If the warnings and waivers are not on the tape, in light of the devastating effect of a tape-recorded confession played to a jury and the lack of any justification for not recording the warnings and waivers, the court should draw an inference adverse to the State or at least be willing to more carefully scrutinize the voluntariness of the confession.¹⁷

3. Scientific Evidence

In *Sizemore v. State*,¹⁸ a prosecution for possession of dangerous drugs, the court of appeals refused to recognize any distinction between *Cannabis indica* and *Cannabis sativa*. The police expert testified for the State that the substance seized from the defendant was marijuana. On cross-examination, he was asked if he had tested the substance to determine if it was *Cannabis indica* or *Cannabis sativa*. He answered that he had not. Since an Indiana statute¹⁹ in

Law, 7 IND. L. REV. 176, 182 (1973).

¹⁴282 N.E.2d at 798.

¹⁵*Id.*

¹⁶301 N.E.2d at 634-35. The supreme court had reached the same result as the *Layton* court in a case preceeding *Lamar*. *Schmidt v. State*, 255 Ind. 443, 265 N.E.2d 219 (1970).

¹⁷The danger of a police refusal to give the warnings in order to extract a confession on tape was frightfully presented by Justice Jackson in his dissent in *Schmidt v. State*, 255 Ind. 443, 458, 265 N.E.2d 219, 233 (1970). In that case, a woman was convicted of first degree murder and her conviction was upheld solely on the basis of a purely exculpatory tape-recorded interview that did not reflect the required warnings or waiver. On habeas corpus petition, her conviction was reduced to manslaughter. *Schmidt v. State*, 300 N.E.2d 86 (Ind. 1973).

¹⁸308 N.E.2d 400 (Ind. Ct. App. 1974).

¹⁹See Ind. Pub. L. No. 212, § 1 (April 2, 1971) (repealed 1973). The language of the current statute is found at IND. CODE § 16-6-8-2 (Burns 1973).

effect at the time only specifically prohibited *Cannabis sativa*, the defendant argued that, in the absence of a test to distinguish the two substances, the State failed to prove that the substance in question was a dangerous drug. Rejecting this argument, the court held that there is only one species of marijuana.²⁰

In *Klebs v. State*,²¹ wherein the defendant had been convicted of causing death while driving under the influence of alcohol, the court outlined the technical statutory foundation that must precede the admission of breathalyzer test results.²² The three requirements for a proper foundation are that the test operator be certified, that the equipment be inspected and approved, and that the techniques used by the operator be approved.²³ The court of appeals found fatal evidentiary absences germane to each of the three requirements. The record did not show that the operator was certified, that the equipment was approved, or that the operator's technique had been approved. In light of independent testimony regarding the amount of toxicants consumed and the defendant's

²⁰The court relied on *United States v. Moore*, 446 F.2d 448 (3d Cir. 1971), which held, on similar facts, that the federal statute prohibited possession of all forms of marijuana. In the *Moore* case, it was necessary to equate all forms because the federal statute said "marihuana means all parts of the plant *Cannabis sativa*" 26 U.S.C. § 4761(2) (1970). In *Sizemore*, it was unnecessary to equate *Cannabis sativa* and *Cannabis indica* because of the language of the Indiana statute then in effect. The statute provided that dangerous drugs included *Cannabis* and in a later passage defined *Cannabis* to include *Cannabis sativa*, but it did not limit the prohibition to only *Cannabis sativa*. It seems clear that all forms of *Cannabis* were thus prohibited.

²¹305 N.E.2d 781 (Ind. Ct. App. 1974).

²²Evidence of .10 percent or more alcohol in the blood is *prima facie* evidence of intoxication. IND. CODE § 9-4-1-56 (Burns 1973). The results of the breathalyzer test in *Klebs* indicated that the defendant's blood alcohol content was .19 percent.

²³305 N.E.2d at 783. These requirements were extracted from both the statutes and the regulations. IND. CODE § 9-4-4.5-6 (Burns Supp. 1974) gives the director of the state department of toxicology of the Indiana University school of medicine the authority to adopt necessary rules and regulations setting forth standards for certification of test operators and providing for periodic inspection of chemical devices. The statute contains the limitation that no test is admissible in evidence unless the test operator is certified by the department of toxicology and the equipment has been inspected and approved. The regulations provide for operator certification only after the operator has taken a course in chemical test devices. The certification is valid for two years. IND. AD. RULES & REG. (47-2003h)-1 (Burns Supp. 1974). Another statute provides that the operator's techniques must be approved by the department of toxicology. IND. CODE § 9-4-4.5-2 (Burns 1973).

erratic driving behavior before the fatal crash, however, the court found the errors harmless.²⁴

4. Photographs

*Warrenburg v. State*²⁵ contains a warning to prosecutors and trial courts alike to exercise greater care and discretion in using and admitting gruesome photographs. Warrenburg was convicted of involuntary manslaughter and, on appeal, objected to the admission of a color photograph of the deceased taken after an autopsy was performed. The photograph showed the partially resected corpse, nude from the waist up, with the right arm severed completely and the left arm reattached with gaping sutures. Since the doctor who performed the autopsy testified that the victim died as a result of blows to the head, the surgical incisions on the corpse were irrelevant. Only the part of the exhibit showing the bruises on the victim's skull should have been admitted. In light of the other evidence in the case, however, the court found that the admission of the photograph was a harmless error.²⁶

In two other cases, the supreme court upheld the admissibility of photographs. In *Hubble v. State*,²⁷ a photograph of a drive-in theater, the scene of a burglary, taken three months after the commission of the crime was held properly admitted even though the premises had changed. The stolen goods had been hidden in the

²⁴Defendant had consumed eight to ten bourbon drinks over a three and one-half hour period. Witnesses testified that Kleb's auto had weaved across the center line several times. The court applied the rule that it will not disturb the judgment of the trial court if there is substantial evidence to establish every element of the crime charged. 305 N.E.2d at 784, *citing* Phillips v. State, 295 N.E.2d 592 (Ind. 1973); Dunn v. State, 293 N.E.2d 32 (Ind. 1973).

²⁵298 N.E.2d 434 (Ind. 1973).

²⁶The court seemed to be espousing the rule suggested in last year's survey that, "when photographs are not necessary to prove the fact but are used as cumulative evidence, the probative value may not outweigh the prejudicial effect." *Evidence, 1973 Survey of Indiana Law*, 7 IND. L. REV. 176, 178-79 n.15 (1973), *citing* Keifer v. State, 239 Ind. 103, 153 N.E.2d 899 (1958), *noted in* 8 DEPAUL L. REV. 418 (1959). *But see* 3 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1231, at 74 (2d ed. 1969), wherein the author states: "It is obviously retrogressive to follow the rule that relevant photographs of gruesome subjects should be admitted in evidence only when they are necessary." *Accord*, Hewitt v. State, 300 N.E.2d 94, 98 (Ind. 1973) (the *Keifer* case said to be very limited in its application); Blevins v. State, 291 N.E.2d 84 (Ind. 1973) (regardless of their gruesome nature, photographs are admissible when what they depict is a proper subject of testimony by witnesses). The law is obviously unclear but the cited cases indicate that post-autopsy photographs which show the body drastically altered are among the most objectionable.

²⁷299 N.E.2d 612 (Ind. 1973).

foliage at the theater. Since the photographs showed more foliage than existed on the date of the burglary, the defendant argued that the photographs tended to mislead the jury into believing that a normal passerby could not have seen the goods and, thus, tended unfairly to support the State's contention that the burglar had hidden the goods with the hope of returning the next evening to retrieve them. Since the deputy sheriff had explained at the trial that the photographs showed more foliage than had existed at the time of the crime and since the photographs showed the lay out of the theater premises in addition to showing the shrubbery, the court held the photographs were properly admitted. Without the sheriff's explanation of the change in foliage, the photographs might well have been found prejudicial as an attempt to mislead the jury.

In *Stephens v. State*,²⁸ photographs of an automobile used in a robbery-kidnap-assault depicted a burnt orange Mercury, whereas the victim told police she was abducted in a red Chevelle. At trial, however, she identified the car in the photograph as the one in which she was abducted. The court said that the defendant's objection went only to the weight of the evidence and not to its admissibility. The defendant also objected to the absence of a proper foundation. Since the photographs were introduced through the victim's testimony, during which she related that the pictures were true and accurate representations of the automobile, the court found that a sufficient foundation had been laid.

The *Stephens* case illustrates the problem of allowing a photograph, in effect, to become the witness. The witness need only look at the photograph and state that it is a fair representation of the scene. Opposing counsel then can only interrupt the examining attorney and ask the witness to describe, without reference to the photograph, whatever scene is depicted. If the witness, in answer to the preliminary question, cannot from his personal recollection describe the contents of the photograph, then the opposing party has effectively discredited the witness' verification. If this procedure had been followed in the present case, the photograph, while still admissible, would have been dramatically discredited.²⁹ Because opposing counsel waited to impeach the witness on cross-examination through the use of her prior inconsistent identification, the jury was allowed to draw the conclusion that the witness was unin-

²⁸295 N.E.2d 622 (Ind. 1973).

²⁹A similar tactic is suggested in 3 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1496, at 399-40 (2d ed. 1969). The danger of this tactic is obvious—it might backfire. The witness may have been shown the photograph before the trial by opposing counsel and may, thus, be able to accurately describe what it depicts without reference to it. The correct recollection of the witness, coupled with the photographic verification, would very effectively establish the truth of the witness' testimony.

formed about car models and colors but knew the real car when she saw it.

5. Chain of Custody

In *Jones v. State*,³⁰ the supreme court held that a ten day gap between the time when a police officer placed in the police laboratory an envelope alleged to contain heroin and the time when he tested the substance did not create a question of the "exact whereabouts" of the exhibit sufficient to destroy the foundation necessary for its admission. The State did not explain what security measures, if any, were taken to prevent substitution, tampering, or mistake; however, all officers who were known to have handled the exhibits testified at the trial. The court held that it was dealing with "probabilities" of non-interference, not with absolute certainties; the mere possibility that the evidence might have been tampered with was not sufficient to make the evidence totally objectionable.³¹ Although the majority recognized the difficulties presented in this case, the majority found it unlikely that anyone without business in the state police laboratory would be present or that anyone would have tampered with the exhibit.³²

This result is questionable. Justice DeBruler, in his dissent, presents a two stage analysis of the chain of custody requirement. First, the state must establish the "exact whereabouts" of the exhibit during the time it was in police custody. If the exact location of the exhibit cannot be established, the evidence should be excluded without further consideration. It is only when the exact location of the exhibit is clearly established that the court need concern itself with "probabilities."³³ Since the police officer did not testify that

³⁰296 N.E.2d 407 (Ind. 1973).

³¹*Id.* at 409, *citing* Kolb v. State, 282 N.E.2d 541, 546 (Ind. 1972).

³²A similar break in the chain of custody occurred in *Graham v. State*, 253 Ind. 525, 255 N.E.2d 652 (1970). A police sergeant removed suspected heroin from the police property room and the heroin was returned six days later by another police officer. The exhibit's whereabouts could not be ascertained from police records nor was it explained by the witnesses since neither of the two officers handling the exhibit testified at the trial. The court in *Graham* stated that, if either of the two police officers had been produced to explain the whereabouts of the exhibit during the six day period, there would likely have been no grounds for challenge.

In *Jones*, even though the officer who deposited the exhibit and later tested it in the laboratory *did* testify, Justice DeBruler, in his dissent, was not satisfied that the exact whereabouts of the exhibit during the entire ten day period had been accounted for. 296 N.E.2d at 411-12.

³³Justice DeBruler's two stage method of analysis is helpful in evaluating a later case decided by the court of appeals. In *Mullins v. State*, 306 N.E.2d 398 (Ind. Ct. App. 1974), a police informant went to Mullin's house and purchased a packet of alleged heroin. He left the house and drove to a

the exhibit remained in the laboratory during the entire ten day period, but rather testified only that he took it there and tested it ten days later, the question of whether the exhibit was removed was a matter of conjecture. The failure to establish the exact location at all times should be per se a failure to lay a sufficient foundation. Furthermore, even if the location were established, too many people had access to the laboratory to rule out the possibility of tampering.

Another interesting point made in *Jones* was that the standard of proof which the State must meet in order to establish the foundation for the chain of custody may vary with the circumstances. In the case of goods of a fungible nature, such as narcotics, and especially in those cases in which the evidence is an essential element of the crime, a higher degree of scrutiny must be placed on the exhibit than in the case of ordinary demonstrative evidence.³⁴

nearby park where he delivered the packet to the narcotics officer. Mullins, at his trial for possession and sale of heroin, objected that the informant's three minute trip from the house to the park constituted a break in the chain of custody. The court correctly found that the first requirement of establishing the "exact whereabouts" of the packet was met when the informant testified at trial that he carried the packet directly from Mullins to the narcotics officer. Regarding the second requirement—excluding the probabilities of tampering—the court said that the fact that the informant had much to gain by implicating Mullins (since the informant was apparently being paid to obtain evidence and also since the informant had a drug charge pending against him) merely raised the conjecture of tampering.

In *Guthrie v. State*, 254 Ind. 356, 260 N.E.2d 579 (1970), the supreme court applied this two stage analysis and held that leaving a slide of a vaginal smear from 12:00 midnight to 8:00 a.m. in a desk at the state police command post did not raise a question as to its exact whereabouts when, as in *Jones*, both the depositor and the receiver of the evidence testified. *Graham v. State*, 253 Ind. 525, 255 N.E.2d 652 (1970), is distinguishable from *Jones* and *Guthrie* in that the depositor and the receiver did not testify. The question in *Guthrie* was thus a question of probabilities. Since a slide, unlike a small packet of heroin, was not likely to be easily tampered with or substituted, the court found the probabilities of tampering minimal. The two dissenters in *Guthrie* found a break in the chain of custody because the police officer receiving the slide could not identify it as the same one presented to him at trial.

In *Kolb v. State*, 282 N.E.2d 541 (Ind. 1972), the exact whereabouts of an exhibit of alleged marijuana was established. The only real question related to the probabilities of tampering during a long period of time during which the exhibit was in the police laboratory and police property room. Again, the mere possibility that it may have been tampered with was not sufficient to render it inadmissible.

³⁴296 N.E.2d at 409. *Accord*, *Guthrie v. State*, 254 Ind. 356, 260 N.E.2d 579 (1970) (the burden on the State to prove non-interference was less in the case of slides of vaginal smears than in the case of heroin). *But see* *Butler v. State*, 289 N.E.2d 772 (Ind. Ct. App. 1972) (the exact whereabouts of an exhibit must be established beyond a reasonable doubt).

In *Bonds v. State*,³⁵ probably as a result of the confusion engendered by the drug cases, both the trial court and the court of appeals reached the correct result but applied a rule unduly harsh to the State. The defendant was convicted of aggravated assault and battery. The shotgun allegedly used in the crime was offered at the trial. The trial court overruled the defendant's objection of failure to establish a proper chain of custody and held that the chain of custody doctrine does not apply to a gun which does not lend itself to adulteration or substitution. On appeal, the court held that the doctrine does technically apply to the offer of a gun, but that the State's burden of negating the possibility of tampering is less than when narcotics are involved.³⁶ Since the shotgun was identified by numerous witnesses as the one used by defendant, the court should have applied the rule that chain of custody is not relevant when a witness identifies the object as the actual object about which he has testified.³⁷

6. Polygraph Tests

The admissibility of polygraph tests in criminal cases is still doubtful. In *Robinson v. State*,³⁸ the court of appeals, while advocating the future admissibility of these tests, seems clearly wrong in upholding the trial court's exclusion of polygraph results. The defendant apparently wanted to introduce polygraph results which

³⁵303 N.E.2d 686 (Ind. Ct. App. 1973).

³⁶See notes 32-34 *supra*.

³⁷This rule was applied in *United States v. Blue*, 440 F.2d 300 (7th Cir. 1971). In a prosecution for bank robbery, the defendant objected to the introduction of twenty-two silver dollars. The FBI office in Washington, D.C., sent the dollars (retrieved from an innocent third party) by mail to the United States Marshall, thus providing the break in the chain of custody to which the defendant objected. At trial, a coin expert identified the twenty-two coins as the ones he had purchased from one of the co-defendants. Therefore, the Government did not need to prove the chain of custody. The court perceptively distinguished the case of *United States v. Panczko*, 353 F.2d 676 (7th Cir. 1965). In *Panczko*, a prosecution for illegal possession of post office keys, the witness could not positively identify the keys as the ones connected with the crime. Therefore, it was necessary to establish a chain of custody of the keys.

In *Holloway v. State*, 300 N.E.2d 910 (Ind. Ct. App. 1973), a chain of custody objection was held not validly applied to the introduction of a paper sack containing two billfolds, miscellaneous papers, and some money, since a witness identified the items as the ones he had seized during the arrest of the defendant. Proposed Fed. R. Evid. 901(b)(1), 56 F.R.D. 183 (1972) [hereinafter cited as Proposed Fed. R. Evid.], provides that "testimony that a matter is what it is claimed to be is sufficient identification."

³⁸309 N.E.2d 833 (Ind. Ct. App. 1974).

tended to exculpate her. The State filed a motion in limine³⁹ to prohibit defense counsel and witnesses from mentioning the fact that defendant had been privately administered a lie detector test. The supreme court, in *Reid v. State*,⁴⁰ earlier held that it was not error to admit, as rebuttal evidence after defendant had testified, the testimony of a polygraph examiner about the results of a test taken by defendant on his own motion and in which he waived all objections. The apparent rule from that case was that polygraph results are admissible if there is a waiver of objection by the person tested.⁴¹

Judge White could not command the concurrence of the other two judges, but he would have held the results admissible. He discounted the risk that the trier of fact would consider the results infallible. He felt that the risk would be no greater than when experts in other areas are permitted to testify.⁴² The real problem he foresaw was that of judging the qualifications of the expert. The General Assembly could solve this problem by providing for licensing and standardization of qualifications for polygraph examiners. Thus, the focus may shift from the question of reliability and prejudice to the issue of the foundation necessary to qualify the examiners.

B. Original Document Rule

Two cases are illustrative of the overlap of the original document rule⁴³ and the official written statement exception to the hear-

³⁹A motion in limine, made before trial, seeks a protective order to prevent the asking of prejudicial questions or the making of prejudicial statements in the presence of the jury. The proper form of the motion is set forth in Davis, *Motions in Limine*, 15 CLEV.-MAR. L. REV. 255 (1966), quoted in Baldwin v. Inter City Contractors Serv., Inc., 297 N.E.2d 831, 834 (Ind. Ct. App. 1973). The motion should include the limitation that the restricted party can make offers to prove outside the hearing of the jury. In *Robinson*, the motion did not contain such a limitation, which led the restricted party (Mrs. Robinson) to believe she could not even make an offer to prove. The State then argued on appeal that, since Mrs. Robinson made no offer to prove, the question could not be raised on appeal. Thus, it can be seen that the motion could be a trap for the unwary.

⁴⁰285 N.E.2d 279 (Ind. 1972), noted in *Evidence*, 1973 *Survey of Indiana Law*, 7 IND. L. REV. 176, 181-82 (1973).

⁴¹See *Evidence*, 1973 *Survey of Indiana Law*, 7 IND. L. REV. 176, 182 (1973) (noting the irrelevance of a waiver if the true basis for excluding polygraph test results is their unreliability).

⁴²Judge White cited MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 207, at 504-07 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

⁴³The original document rule, frequently called the "best evidence" rule, has been defined thus:

[I]n proving the terms of a writing, where the terms are material,

say rule.⁴⁴ In *State v. Loehmer*,⁴⁵ the State appealed the discharge of a defendant in a prosecution for driving with a suspended license.⁴⁶ The trial court sustained the defendant's objection to admission of a "computer printout" of his driving record which showed that his license was suspended at the time of the offense. The defendant argued that the printout was not the "best evidence" and that there was a statutory prohibition against its admission.⁴⁷ The trial court ruled that the printout was hearsay.

The court of appeals attempted to unravel the relationship between the Indiana statutes dealing with the driving records of the department of motor vehicles and the statute declaring certified copies of the public records admissible in evidence. Judge Staton, in reversing the trial court, ruled that the same statute provides for both an official written statement exception to the hearsay rule and the certified copy exception to the original document rule. The statute provides that copies of records shall be proved or admitted as legal evidence in any court when the keeper of the records attests that they are true and complete copies and affixes his seal upon

the original writing must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent.

Id. § 230, at 560.

⁴⁴The common law permitted, as an exception to the hearsay rule, written statements made by public officials whose duty was to make such statements with firsthand knowledge of the facts. The declarant's official duty and the availability of the written statements for public inspection added a special badge of truth. The necessity for the use of such statements was found in the inconvenience of requiring public officials to appear in court to authenticate the documents. *See id.* § 315, at 735-36.

⁴⁵304 N.E.2d 835 (Ind. Ct. App. 1973).

⁴⁶*See* IND. CODE § 35-10-1-1 (IND. ANN. STAT. § 9-2305, Burns Repl. 1956); *id.* § 35-1-43-2 (IND. ANN. STAT. § 9-2101); IND. R. APP. P. 15(G). These provisions allow the State to appeal in a criminal case, but the defendant will not be placed in jeopardy again. He may be required to pay costs of the appeal if he loses. The procedure is fraught with constitutional infirmities, the discussion of which is beyond the scope of this Article.

⁴⁷Defendant's assertion of a statutory bar to the introduction of the printout was based upon a limitation contained in the portion of the motor vehicle code which makes one's driving record available to any person, but provides that "[s]uch record shall not be admissible as evidence in any . . . criminal proceeding arising out of a motor vehicle accident." IND. CODE § 9-2-1-29 (Burns 1973). Since defendant was prosecuted for driving with a suspended license, and since no motor vehicle accident was involved, the court held the statute inapplicable. Although the opinion does not disclose the nature of the charges which led to the original suspension of Loehmer's license, if the suspension involved an automobile accident, the second charge would, indirectly, have arisen out of the accident. In that situation, the State should not be allowed to introduce the driving record of the defendant in contravention of the directive of the statute.

them.⁴⁸ This statute is obviously an exception to the original document rule. Since it is included in the Code among other exceptions to the hearsay rule, and since it provides for both proving and admitting documents, it must also be deemed an official written statement exception to the hearsay rule. Another Indiana statute governing the records of the department of motor vehicles contains a provision that certified copies of driving records are admissible “in a like manner” as originals.⁴⁹ Also, Indiana Rule of Trial Procedure 44, although not mentioned by the court, provides for admission of copies of official records attested to by the officer having custody of the record.⁵⁰ Thus, the general statute, the specific motor

⁴⁸IND. CODE § 34-1-17-7 (Burns 1973) provides:

Exemplifications or copies of records, and records of deeds and other instruments, or of office books or parts thereof, and official bonds which are kept in any public office in this state, shall be proved or admitted as legal evidence in any court or office in this state, by the attestation of the keeper of said records, or books, deeds or other instruments, or official bonds, that the same are true and complete copies of the records, bonds, instruments or books, or parts thereof, in his custody, and the seal of office of said keeper thereto annexed if there be a seal, and if there be no official seal, there shall be attached to such attestation, the certificate of the clerk, and the seal of the circuit or superior court of the proper county where such keeper resides, that such attestation is made by the proper officer.

The subsection uses the words “shall be proved or admitted as legal evidence,” which words indicate its dual purpose as both a statutory method of proving, or authenticating, official written documents and of declaring them admissible. In a civil case, *Coffey v. Wininger*, 296 N.E.2d 154 (Ind. Ct. App. 1973), the court of appeals held that the quoted section is a statutory exception to the hearsay rule.

⁴⁹IND. CODE § 9-1-1-8 (Burns 1973) provides in part:

(b) The commissioner and such officers of the department as he may designate are hereby authorized to prepare and deliver upon request a certified copy of any record of the department . . . and every such certified copy shall be admissible in any proceeding in any court in like manner as the original thereof.

This statute, unlike *id.* § 34-1-17-7, reprinted at note 48 *supra*, contains no language which declares the certified copy to be admissible in evidence as an official written document exception to the hearsay rule. It merely provides an exception to the original document rule. Thus, to justify statutorily the admission over a hearsay objection, reference to section 34-1-17-7 is necessary.

⁵⁰IND. R. TR. P. 44(A) (1) provides in part:

An official record kept within the United States, or any state, . . . or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy. . . .

Note that Trial Rule 44(A) (1) operates only as an exception to the original document rule and not as an exception to the hearsay rule. It speaks only

vehicle statute, and Trial Rule 44 all provide for admission over a "best evidence" objection.

In *Enlow v. State*,⁵¹ a prosecution for auto banditry, the supreme court found error in the admission of a police officer's oral testimony that the truck involved was registered at the State Bureau of Motor Vehicles as belonging to Enlow. The court noted several well-recognized exceptions to the rule that the original document must normally be produced—one of which is the public records exception.⁵² Trial Rule 44 allows not only for proof of official documents by certified copies but also for proof "by any other method authorized by law."⁵³ The court said that "other method" would include examined copies authenticated by a witness who has personally compared the copies with the original. However, the oral testimony of a police officer was obviously not the original document, not a certified copy, and not an examined copy and, therefore, should have been excluded.

The point to be reiterated is that public records are generally admissible under an exception to the hearsay rule by virtue of Indiana Code section 34-1-17-7. Attested copies are admissible under an exception to the original document rule, which exception is found in section 34-1-17-7 and also in Trial Rule 44. In addition, in some cases, such as *Loehmer*, exceptions may be found in more specific statutes governing the area of law in question.

C. Impeachment

1. Reputation as to Character

The supreme court refused to extend the rule of *Shropshire v. State*⁵⁴ to prohibit the introduction of evidence of the disposition of a prior juvenile matter, which evidence was used to impeach on cross-examination a witness called by the defendant as a character witness. In *Lineback v. State*,⁵⁵ the court held that, while juvenile matters are not admissible, as are prior convictions, to affect the credibility of the *defendant* as a witness, a defendant who first

to the manner of proving a document once the document has been determined to be competent evidence.

⁵¹303 N.E.2d 658 (Ind. 1973).

⁵²*Id.* at 661, citing McCORMICK § 240.

⁵³IND. R. TR. P. 44(C) provides: "This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law."

⁵⁴279 N.E.2d 225 (Ind. 1972), noted in *Evidence, 1973 Survey of Indiana Law*, 7 IND. L. REV. 176, 186-87 (1973). *Shropshire* was not mentioned by the court, but the earlier case of *Woodley v. State*, 227 Ind. 407, 86 N.E.2d 529 (1949), upon which *Shropshire* was based, was cited.

⁵⁵301 N.E.2d 636, *aff'g on rehearing* 296 N.E.2d 788 (Ind. 1973).

places his reputation before the jury through character witnesses opens his entire life to scrutiny in order that the jury may determine whether the witness is, in fact, conversant with the defendant's reputation.⁵⁶

Justice DeBruler questioned the decision in light of the absolute rule of exclusion of juvenile dispositions found in Indiana Code section 31-5-7-15, which provides that the "disposition of a child or any evidence given in the court shall not be admissible as evidence against the child."⁵⁷ The court's holding might be justifiable because the purpose of the inquiry was to test the witness' familiarity with the defendant's reputation and to impeach the witness' opinion. Thus, the juvenile record was not technically admitted as direct substantive evidence "against" the defendant. However, the admission of this evidence in *Lineback* does not square with the result reached in *Shropshire*. In *Shropshire*, the supreme court reversed the trial court, which had used the same rationale the court in *Lineback* used to admit the defendant's answers to questions which revealed his juvenile record.

Two other aspects of *Lineback* raise questions not dealt with by the court. First, the prosecutor asked the question, "Did you know that on the 23rd day of March, 1963, he [the appellant] was found to be an incorrigible juvenile?"⁵⁸ This question solicited firsthand information from the witness. In the past, the accepted view, ironically enough, required that reputation questions, on both direct and cross-examination, solicit answers based solely on hearsay—"Have you heard . . ."⁵⁹ The Proposed Federal Rules of Evidence allow proof of character to be made by reputation and

⁵⁶Although not cited by the *Lineback* court, an old Texas case reached the same result in light of a similar juvenile statute. *France v. State*, 148 Tex. Crim. 341, 187 S.W.2d 80 (1945). More recently, a federal district court, in *United States v. Booz*, 325 F. Supp. 1280 (E.D. Pa. 1971), held that the prosecution could validly question a reputation witness about a defendant's felony conviction eighteen years earlier. The *Booz* court noted that the leading case, *Michelson v. United States*, 335 U.S. 469 (1948), allowed questions about two prior convictions which had occurred twenty and twenty-seven years prior to the trial. The trial court in *Booz*, however, instructed the jury that the prior conviction was to be considered only in evaluating the reputation testimony and was not to be used as evidence against the defendant.

⁵⁷IND. CODE § 31-5-7-15 (Burns 1973).

⁵⁸301 N.E.2d at 637.

⁵⁹See, e.g., *Michelson v. United States*, 335 U.S. 469 (1948).

Since the whole inquiry . . . is calculated to ascertain the general talk of people about defendant, rather than the witness' own knowledge of him, the form of inquiry, "Have you heard?" has general approval, and "Do you know?" is not allowed.

Id. at 482 (citations omitted). See also *Wilcox v. United States*, 387 F.2d 60 (5th Cir. 1967). See generally *McCORMICK* § 191.

opinion testimony on both direct and cross-examination.⁶⁰ In addition, on cross-examination, specific instances of misconduct may be shown. Although the Proposed Federal Rules do not speak to the exclusion of juvenile matters, their application to the *Lineback* situation would sanction questions by the prosecutor soliciting on cross-examination personal knowledge of specific acts of misconduct.

A safeguard, not mentioned by the *Lineback* court or the Proposed Federal Rules of Evidence, which should be required would be to request the prosecutor, when he seeks to cross-examine a character witness through the use of questions about specific acts of misconduct, to demonstrate to the trial court, out of the hearing of the jury, the actual existence of the specific acts of misconduct in question and their relevancy.⁶¹ This procedure would insulate the jury from unsupported innuendo as a result of questions asked without basis and in bad faith by the prosecutors. This requirement would work no hardship on the State. If the specific act occurred, the prosecution would have the foundation in the record. On the other hand, if the act did not occur, it would be grossly unfair to allow questions based upon nonexistent conduct. If the acts occurred and were used by the prosecutor, a careful instruction to the jury limiting their use as evidence should be required.⁶²

⁶⁰Proposed Fed. R. Evid. 803(21) provides for admissibility, as an exception to the hearsay rule, of evidence of the "reputation of a person's character among his associates or in the community." *Id.* 405(a) provides the method of proof:

In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

The Advisory Committee's note to rule 405(a) suggests that this rule changes the one announced in *Michelson v. United States*, 335 U.S. 469 (1948). See note 59 *supra*.

⁶¹The suggested procedure was approved in *Michelson v. United States*, 335 U.S. 469, 481 n.18 (1948), "as calculated in practice to hold the inquiry within decent bounds." In *United States v. Phillips*, 217 F.2d 435, 443-44 (7th Cir. 1954), the court held that the prosecution must demonstrate the existence of the act of misconduct and an instruction must be given by the judge explaining the limited purpose of the cross-examination. The *Phillips* case was cited by the Michigan Supreme Court as authority for requiring the same two safeguards. *People v. Dorrikas*, 354 Mich. 303, 92 N.W.2d 305 (1958). See McCORMICK § 192, at 458 & n.81, wherein the author would require a "professional statement" from the prosecutor that he has reason to believe and does believe that the acts in question have occurred.

⁶²Once the defendant puts his character in issue, nothing, of course, regardless of all of the above, prevents the state from calling its own witnesses on rebuttal to testify to defendant's bad reputation.

2. *Specific Acts of Misconduct*

In *Dexter v. State*,⁶³ a unanimous supreme court specifically applied the landmark case of *Ashton v. Anderson*⁶⁴ to the impeachment on cross-examination of a defendant in a criminal case. The defendant had chosen to testify and thereby had placed his credibility in issue. At trial, the prosecutor, over objection, was permitted to cross-examine the defendant concerning prior convictions for assault. Since assault does not involve the individual's propensity to tell the truth and is not one of the infamous crimes which, by statute,⁶⁵ may be used to impeach a witness, the questions were improper and the case was reversed.⁶⁶

Judge Sharp of the court of appeals, in *Lewis v. State*,⁶⁷ took *Ashton* a step further and held that impeachment questions concerning prior convictions, other than those permitted by *Ashton*, are improper even in a case tried to a judge without a jury. This ruling is questionable in light of numerous pronouncements by the Indiana courts that harm arising from evidentiary error is lessened, if not totally annulled, when the trial is to the court.⁶⁸

⁶³297 N.E.2d 817 (Ind. 1973).

⁶⁴279 N.E.2d 210 (Ind. 1972), noted in *Evidence, 1973 Survey of Indiana Law*, 7 IND. L. REV. 176, 187-88 (1973). The court also held that the *Ashton* rule would not be applied retroactively, but since *Dexter's* case was pending at the time *Ashton* was decided, it should apply to his case.

⁶⁵IND. CODE § 34-1-14-14 (Burns 1973). Infamous crimes include treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, willful neglect, and corrupt perjury.

⁶⁶Evidence of prior crimes would be admissible to establish defendant's intent, motive, purpose, identification, or the presence of a common scheme or plan. *Woods v. State*, 250 Ind. 132, 235 N.E.2d 479 (1968). There was no attempt in *Dexter* to relate the cross-examination to any of the exceptions noted in *Woods*.

⁶⁷299 N.E.2d 193 (Ind. Ct. App. 1973) (the prosecution questioned the defendant about prior convictions for malicious trespass and joy-riding).

⁶⁸See *King v. State*, 292 N.E.2d 843 (Ind. Ct. App. 1973), noted in *Evidence, 1973 Survey of Indiana Law*, 7 IND. L. REV. 176, 210 (1973), citing *Shira v. State*, 187 Ind. 441, 119 N.E. 833 (1918). The court in *King* stated:

What might very well constitute prejudicial error in the form of testimony given before a jury does not necessarily constitute prejudicial error in a trial to the court. It must be remembered that a trial judge is presumed to know the intricacies and refinements of the rules of evidence and that he sifts the evidence and weighs it in the light of his legal experience and expertise. He is thus able to separate the wheat from the chaff, ignoring the extraneous and it is only when his judgment has apparently or obviously been infected by erroneously admitted evidence that we will set it aside.
292 N.E.2d at 846.

If a party seeks to use a particular conviction for impeachment, the *Ashton* rationale would necessitate that the trial court, on the application of a party and as a preliminary matter, determine whether the particular conviction was for a crime which reflects on the individual's credibility for truth and veracity. The *Lewis* extension of the *Ashton* rule would mandate a bifurcated proceeding with a different judge for this preliminary determination because, if the trial judge became aware of the convictions at any time prior to judgment, the case would be subject to reversal. The better approach would be to presume that the trial judge is capable of ignoring the legally irrelevant convictions and to set aside his judgment on appeal only when it is obviously affected by the prior convictions.

In *Bryant v. State*,⁶⁹ the supreme court held that a collateral matter cannot be made the basis for impeachment. In this prosecution for second degree murder, the State attempted to question the defendant about testimony she had given in a previous prosecution for murder fourteen years earlier. In the present case and in the earlier trial, which resulted in acquittal, she testified to sexual assaults and to continuous drinking by the victims. In cross-examining the defendant, the prosecutor merely asked her if she had previously "testified" about sexual assaults and drinking but did not mention that the previous testimony was given in her former trial. The prosecutor did this even though the trial court, upon defendant's motion, had previously granted a protective order forbidding the mentioning of any facts connected with the previous prosecution.

The supreme court could find no basis for permitting the questioning because, under the *Ashton* rule, only prior convictions may be used to impeach. The statement was also not admissible as a prior inconsistent statement. The court said the testimony was on a "collateral matter"⁷⁰ which cannot be made the basis of impeachment. The State attempted to do by innuendo what the law of evidence has always considered to be legally irrelevant, that is, to apprise the jury of the defendant's prior involvement in an incident amazingly similar to the one for which the defendant was being tried.

⁶⁹301 N.E.2d 179 (Ind. 1973).

⁷⁰

The test as to whether the matter is collateral is whether the party seeking to introduce it for purposes of contradiction would be entitled to prove it as a part of his case. It is obvious that the defendant's testimony in the prior trial had no relevance to the guilt or innocence in the latter one.

Id. at 184.

D. Hearsay

1. Self-Serving Declarations

The supreme court aligned itself with the traditional view that statements to others which tend to establish the position of the party-declarant are inadmissible whether made prior or subsequent to the act in question and even though they reflect upon the party's state of mind at the time of the declaration. In *Cain v. State*,⁷¹ the defendant, on trial for second degree murder, called his girl friend to testify to remarks the defendant had made to her both prior and subsequent to the killing, which remarks would tend to show that he had no malicious intent to kill. The trial court sustained the state's objection that the conversations were hearsay and self-serving.

The affirmance of the trial court's exclusion of the defendant's statements to his girl friend was also based on alternative holdings—that the statements were not within an exception to the hearsay rule and that they were self-serving. Defendant had argued that the statements were part of the "res gestae" of the act, but it was clear that the statements made both prior and subsequent to the killing were not engendered by the excitement of the act. Defendant made no argument that they should be admitted as part of the "state of mind" exception to the hearsay rule, but the court, nevertheless, said that statements tending to negative intent are inadmissible.

This latter conclusion, at first glance, appears to mean that self-serving statements should be excluded per se regardless of whether or not they would otherwise be admissible as an exception to the hearsay rule. However, a careful examination of the *Cain* decision tends to narrow the effect of its holding. A case cited by the *Cain* court for the proposition that statements to negative intent are properly excluded as self-serving upheld the exclusion of the defendant's testimony about statements made to a larceny victim.⁷²

⁷¹300 N.E.2d 89 (Ind. 1973).

⁷²*Spittorff v. State*, 108 Ind. 171, 8 N.E. 911 (1886). It is significant that in *Spittorff* the defendant, unlike *Cain*, testified but his declarations tending to establish innocence were excluded nevertheless. *Spittorff* also illustrated the problem courts face in deciding whether a statement is self-serving:

That he [defendant] manifested a disposition to instigate a prosecution against Gladding [his co-defendant], and professed a willingness to testify to what he had already told a number of persons in relation to the matter . . . did not . . . tend to demonstrate his innocence.

Id. at 173, 8 N.E. at 912. Declarations of this nature were held admissible because they were not self-serving. See also, e.g., *Moss v. State*, 208 Ark.

The defendant offered to prove that, on the day following the larceny, he went to the house of the victim, urged the victim to institute a prosecution against a co-defendant and urged the victim to call defendant as a witness. In that case, however, similar statements made to other persons had already been testified to by other witnesses. Thus, the defendant was able to make his defense without the excluded statement. Another case, not cited by the court, clearly establishes that if the declarations are part of the "res gestae," they are admissible whether self-serving or not.⁷³

A special problem, peculiar to criminal cases, should also be noted. In *Cain*, the defendant could have testified to his intent and would have been subject to cross-examination but instead invoked his constitutional privilege against testifying. The court would not sanction the admission of evidence immune from cross-examination as a result of defendant's own trial strategy. Since the court feared that there would be too great a risk that a defendant would manufacture evidence, it said that it was not forcing the defendant to choose between the right to remain silent and his due process right to present his defense.

The foregoing suggests the narrow rule that in criminal cases in which the defendant chooses not to testify, statements by the accused made to another tending to negative the requisite intent are inadmissible unless there is some independent indicia of their reliability which would make them admissible under a recognized exception to the hearsay rule.⁷⁴ The state of mind exception to the hearsay rule, formulated in *Mutual Life Insurance Co. v. Hillmon*,⁷⁵

137, 185 S.W.2d 92, 94 (1945). The defendant, in *Moss*, told a witness shortly after the killing, "I shot that fellow—I had to kill him—he threw something at me." This type of declaration, while containing self-serving aspects, is also an admission against defendant's interest which establishes the indicia of reliability requisite for admission.

⁷³In *Hiatt v. Trucking, Inc.*, 122 Ind. App. 411, 415, 103 N.E.2d 915, 917 (1952), a defense witness testified that the defendant driver of one of the cars involved in an accident said, "Why did that man turn in front of me?" The statement, although obviously self-serving, was admitted as part of the "res gestae." Since *Hiatt* was a civil case, the defendant seeking to prove the declaration, unlike *Cain*, could be called to testify.

⁷⁴This narrow rule would find support from McCORMICK § 290, at 688; Comment, *Evidence—Hearsay—Exclusion of Self-Serving Declarations*, 61 MICH. L. REV. 1306, 1318-20 (1963).

⁷⁵145 U.S. 285 (1892). As to this exception, one author states:

The special assurance of reliability for declarations of present state of mind rests . . . upon their spontaneity and probable sincerity. . . . The special need for use of the declarations does not rest on the unavailability of the declarant—this is not required—but upon the ground that if the declarant were called to testify "his own memory of his state of mind at a former time is no more likely to

is unavailable in the context of the extrapolated *Cain* rule. Whether the court would allow the statements to be admitted into evidence if the defendant took the stand and could be cross-examined remains an open question. Of course, even the validity of the rule that self-serving statements can be admitted into evidence as excited utterances is subject to doubt when the statements are sought to be introduced in a criminal case. Justice DeBruler, who concurred in the *Cain* result but disagreed with the reasoning of the court, asserted that the defendant's statement that he was afraid of the victim was not within the definition of hearsay since no factual occurrences were sought to be established by it. Justice DeBruler also said that the other aspect of the conversation, that defendant had fought with the victim, should have been admitted under the state of mind exception to the hearsay rule.⁷⁶

2. Reputation as Substantive Evidence

In *Sumpter v. State*,⁷⁷ the supreme court declared unconstitutional the practice of introducing evidence of the reputation of a defendant and the reputation of a "house of ill fame" to prove the fact that the defendant was a prostitute and that the house in question was one of ill fame. The court overruled two old Indiana cases⁷⁸ which had recognized reputation testimony in such cases as an exception to the hearsay rule. The court could not find the indicia of reliability necessary to prevent hearsay testimony from violating the confrontation clauses of the United States and Indiana Constitutions. Since the gist of the offense was visiting or living in a house where prostitution had actually occurred, the reputation of the house or defendant was irrelevant. Given that ground

be clear and true than a bystander's recollection of what he then said."

McCORMICK § 294, at 695 (footnotes omitted), quoting from *Hillmon*, 145 U.S. at 295.

⁷⁶300 N.E.2d at 94 (DeBruler, J., concurring). Justice DeBruler also quoted the McCormick treatise in support of his view that there should be no per se rule excluding self-serving declarations:

The notion that a party's out-of-court declarations could not be evidence in his favor because of their "self-serving" nature seems to have originated as an accompaniment of the now universally discarded rule forbidding parties to testify. When this rule of disqualification for interest was abrogated by a statute, any sweeping rule of inadmissibility regarding "self-serving" declarations should have been regarded as abolished by implication.

McCORMICK § 290, at 688.

⁷⁷306 N.E.2d 95 (Ind. 1974).

⁷⁸*Schultz v. State*, 200 Ind. 1, 161 N.E. 5 (1928); *Betts v. State*, 93 Ind. 375 (1883). The latter case held that particular acts of prostitution need not be proved.

for exclusion, it is not readily apparent why the court determined that the use of reputation testimony was *constitutionally* impermissible. Other courts have excluded the same type of reputation testimony on nonconstitutional grounds.⁷⁹

3. *Admissions of a Party*

In *Robinson v. State*,⁸⁰ the defendant was accused of the murder of her fifteen month old son. The main issue in the case was whether the killing was accidental or intentional. Firemen responded to a call for first aid at the house of the defendant's mother. After the firemen placed the boy in the ambulance, one of them returned to the house to pick up his gloves and a first-aid kit. At trial, the fireman testified that he heard voices from another room. One voice, which he identified as that of the defendant's mother, said, "You shouldn't have thrown the baby against the wall. You were beating him too hard."⁸¹ The voice he identified as the defendant's answered, "Shut up."⁸²

Defendant contended that the fireman's testimony was hearsay; the State justified it as an "admission against interest."⁸³ The court stated the rule that, when a criminal accusation is made in the presence of the person accused, the person's silence or failure to contradict or explain the statement may be proved as an admission. The circumstances must be such as to afford him an opportunity to speak and such as would naturally call for some action or reply from persons similarly situated.⁸⁴ Since the most important element of this rule is the accused's failure to deny, an equivocal response may be used as an admission.

⁷⁹See, e.g., *People v. Flagg*, 18 Ill. App. 2d 548, 153 N.E.2d 116 (1958); *Commonwealth v. Mahramus*, 211 Pa. Super. 376, 263 A.2d 572 (1967).

⁸⁰309 N.E.2d 833 (Ind. Ct. App. 1974). See also text accompanying notes 38-42 *supra*.

⁸¹309 N.E.2d at 837.

⁸²*Id.*

⁸³The proper characterization is simply "admission." The court was confusing "declarations against interests" with party admissions. The distinction between these two exceptions to the hearsay rule is explained in *Evidence*, 1973 *Survey of Indiana Law*, 7 IND. L. REV. 192 n.78 (1973).

⁸⁴The *Robinson* court took this rule from *Diamond v. State*, 195 Ind. 285, 291, 144 N.E. 466, 468 (1924). McCormick states this hearsay exception as follows:

If a statement is made by another person in the presence of a party to the action, containing assertions of facts which, if untrue, the party would under all circumstances naturally be expected to deny, his failure to speak has traditionally been receivable against him as an admission.

MCCORMICK § 270, at 651-52, *citing* 4 J. WIGMORE, EVIDENCE § 1071 (Chadbourn rev. 1972) [hereinafter cited as WIGMORE].

Defendant argued that the term "shut-up" was a denial.⁶⁵ The court found the term susceptible of more than one meaning, thus rendering both the accusation and the reply admissible. The court recognized the danger involved in allowing a jury to hear evidence of a hearsay accusation and an equivocal reply as opposed to merely a defendant's reply, since the accusation may convince the jury that the defendant is guilty even when the jurors understand the reply as a denial. A proper instruction not to consider an accusation as evidence of the facts stated therein would lessen this danger.

E. Sufficiency of the Evidence

1. Corroboration of Confessions

The Indiana Court of Appeals for the Second District, in *Green v. State*,⁶⁶ an appeal from a conviction for assault and battery with intent to kill, split sharply over the quantum of independent corroborative evidence, in addition to an extrajudicial admission, necessary to establish the existence of the corpus delicti of a crime. The rather bizarre factual pattern of this case must necessarily be set forth in some detail since the sufficiency of the evidence was the only question presented to the court. The defendant, Johnny Green, was arrested at a department store for shoplifting. When Green escaped the police officer's grasp, the officer notified another policeman, Officer Cambridge, and gave him a description of Green. Cambridge spotted Green stopping a car on a nearby street. Cambridge yelled for Green to stop, but Green entered the car anyway. As Officer Cambridge circled in front of the car, it lunged forward three or four feet and, in so doing, injured Cambridge slightly. There was then a scuffle over the possession of the car keys between the innocent driver of the car and Green. The driver managed to keep control of the keys and to escape from the vehicle.

At trial, Officer Cambridge testified to the above and also, without objection, to the following statement made by the defendant at the jail:

⁶⁵In her brief, defendant used the following example to support her contention:

[W]hen one school boy calls another a "sissy," the boy blurts out "Shut-up." He obviously does not mean to imply an admission that he is in fact a sissy. He is saying in effect, "I am not and don't say that I am."

309 N.E. at 841.

⁶⁶304 N.E.2d 845 (Ind. Ct. App. 1973). For a discussion of the requirement of corroboration, see MCCORMICK § 158, at 346-49; *Developments in the Law—Confessions*, 79 HARV. L. REV. 938, 1072-84 (1966); Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession*, 103 U. PA. L. REV. 638 (1955).

Mr. Green related to me at the time he was sorry he had tried to run over me with the car, he wanted a quick and speedy trial, he wanted to get it out of the way and start pulling his time as soon as he could.⁸⁷

In his testimony, the defendant denied the apology and said that he had told Officer Cambridge that it was the innocent driver who caused the car to lunge forward, and that he, Green, had pressed the brake. He also testified that he saw Cambridge in front of the car but that his only intention was to get away.

The majority postulated some basic general rules applicable to the case. First, a conviction may not rest solely upon a confession of guilt⁸⁸ and, secondly, to protect against convicting a man by his testimony alone, a confession is not admissible unless there is independent proof of the corpus delicti. Although, in *Green*, the majority was confronted with an admission as opposed to a confession, the court treated the admission as if it were a full confession.⁸⁹

The court stated that the corpus delicti consists of three elements: (1) the occurrence of a specific injury or loss, (2) a criminal, as opposed to an accidental, cause, and (3) the identity of the accused as the perpetrator of the crime.⁹⁰ Independent evidence of only the first two elements is needed to make a confession admissible; to require that the third element be proved would be absurd, because it would require proving the whole crime and would make the admission of a confession superfluous. The majority and the dissent disagreed on whether the State must introduce independent evidence of both the existence of injury and the fact that the injury resulted from a criminal act. Both, however, agreed that the State, in order to admit a confession, need not establish the corpus delicti beyond a reasonable doubt. The majority cited two cases which establish that there must be independent evidence of both elements,⁹¹ but the court's holding apparently requires only indepen-

⁸⁷304 N.E.2d at 847.

⁸⁸*Id.* at 848.

⁸⁹

A confession is the admission of guilt by the defendant of all the necessary elements of the crime of which he is charged, including the necessary acts and intent. An admission merely admits some fact which connects or tends to connect the defendant with the offense but not with all the elements of the crime.

Id., quoting from *State v. Masato Karumai*, 101 Utah 592, 596, 126 P.2d 1047, 1052 (1942). The dissent likewise found the distinction immaterial in this case. 304 N.E.2d at 854.

⁹⁰304 N.E.2d at 849-50, citing WIGMORE § 2072, at 401.

⁹¹Both *Watts v. State*, 229 Ind. 80, 101, 95 N.E.2d 570, 579 (1950), and *Parker v. State*, 228 Ind. 1, 7, 88 N.E.2d 556, 558 (1949), required "evidence of probative value," aside from the admission or confession to prove that the crime charged was committed. The courts stated that there must also be some

dent evidence on any one element of the corpus delicti. The majority found that Green's confession, with the other testimony of Officer Cambridge, established guilt beyond a reasonable doubt. Since Green did not object to the introduction of the confession, the majority did not consider the issue of whether it would have been admissible if properly objected to.

Judge White, in dissent, reasoned that the issue of the quantum of independent evidence necessary to support the use of the admission was not waived by Green's failure to object. Judge White recognized that, while this question would often arise at the time the admission or confession was offered, the issue was still properly before the court because it was considering the sufficiency of the evidence to support a conviction.⁹² In any case, Judge White felt the conviction so fundamentally erroneous that he would have decided the issue *sua sponte*. If Green's admission were eliminated from the evidence, there was some evidence showing injury but no evidence that someone was criminally responsible for the injury. In short, Judge White found nothing except Green's extrajudicial admission from which it could be inferred that the forward lunge of the car was other than accidental.

The dissent points out that the statement by Officer Cambridge, that the innocent driver, Harris, reapplied the brakes after the car lunged, was based on a declaration made by Harris after the incident and in Green's presence. Thus, the statement was admissible as an implied admission through silence, since Green did not unequivocally deny that Harris had applied the brakes.⁹³ This serves as more evidence that the act was criminal and, also, as the majority noted, serves as evidence of Green's guilt since the driver, Harris, was not a suspect. Despite the voluminous quotations from earlier cases by both the majority and the dissent, *Green* manifests no disagreement concerning the applicable rules of law. The question of whether there was sufficient evidence on the second element of the corpus delicti was a question of fact. It seems obvious that the testimony that the innocent driver reapplied the brakes, Green's statement that he merely intended to get away, and the

independent evidence tending to prove that the crime charged has been committed by someone before the admission or confession is admissible.

⁹²304 N.E.2d at 856 (White, J., dissenting), *citing* *Parker v. State*, 228 Ind. 1, 12, 88 N.E.2d 556, 559 (1949).

⁹³That Harris reapplied the brake is something Officer Cambridge could not have known from firsthand knowledge. When defendant's attorney learned that Cambridge's conclusion was based on a conversation with Harris in Green's presence, defendant's attorney made no attempt to learn whether defendant's reaction was a denial of admission and made no objection to the testimony. For the requirements for the admissibility of an implied admission, see note 84 *supra*.

circumstantial fact that Green was fleeing a police officer at the time would be some evidence on the second element despite the dissent's statement that there was no independent evidence on this point.

2. Standard of Proof

In *Ringham v. State*,⁹⁴ the supreme court split on the question of the standard of proof required in criminal cases based upon circumstantial evidence. In an appeal from a conviction of second degree murder, the majority affirmed the trial court's use of an instruction which stated that, while every material element of the crime charged must be proved beyond a reasonable doubt, it is "not necessary that all incidental or subsidiary facts should be proved beyond a reasonable doubt."⁹⁵ A similar charge using the term "subsidiary evidence" was disapproved in an earlier Indiana case,⁹⁶ which the dissent felt to be controlling. The majority, however, said that the evidence in its entirety must be weighed and considered to determine whether every material element of the crime charged has been proved beyond a reasonable doubt. The decision seems in line with other cases lowering the standard of proof on some elements such as the voluntariness of a confession⁹⁷ and the establishment of the corpus delicti for purposes of admitting a confession or admission.⁹⁸

3. Circumstantial Evidence

A number of recent decisions, dealing with the scope of appellate review of convictions based solely on circumstantial evidence, reached conflicting results.⁹⁹ Only two illustrative cases will be mentioned here. The stricter view was espoused in *Carpenter v. State*¹⁰⁰ in which the court held that, to be sufficient to sustain a conviction, circumstantial evidence must exclude every reasonable hypothesis of innocence.¹⁰¹ In other words, an appellate court is

⁹⁴308 N.E.2d 863 (Ind. 1974).

⁹⁵*Id.* at 866.

⁹⁶*White v. State*, 234 Ind. 209, 125 N.E.2d 705 (1955).

⁹⁷*Lego v. Twomey*, 404 U.S. 477 (1972); *Ramirez v. State*, 286 N.E.2d 219 (Ind. Ct. App. 1972), noted in Kerr, *Criminal Procedure, 1973 Survey of Indiana Law*, 7 IND. L. REV. 128 (1973).

⁹⁸*Green v. State*, 304 N.E.2d 845 (Ind. Ct. App. 1973). See text accompanying notes 86-93 *supra*.

⁹⁹The cases have been surveyed and the problem discussed in Note, *Appellate Review of Circumstantial Evidence in Indiana Criminal Cases*, 7 IND. L. REV. 883 (1974).

¹⁰⁰307 N.E.2d 109 (Ind. Ct. App. 1974) (first district).

¹⁰¹This rule was mandated by *Manlove v. State*, 250 Ind. 70, 232 N.E.2d

free to review the evidence and, even though it might support the trier of fact's conclusion, the evidence is insufficient, and the conviction should be reversed, if the evidence is also consistent with a theory of innocence.¹⁰² The other view, enunciated in *Atkins v. State*,¹⁰³ is that the reviewing court looks at the evidence only to determine if the trier of fact could have reasonably drawn therefrom an inference of guilt. Even though inferences of innocence could have been drawn as well, the court will not set aside the inference of guilt.

The two tests are obviously not merely semantical differences. One author has noted that, of twenty cases applying the less strict standard of review, only eight would have been affirmed under the more strict reasonable hypothesis of innocence test.¹⁰⁴ The author recommends the reasonable hypothesis of innocence test because, since the testimonial evidence does not directly establish guilt, the reviewing court is just as capable of determining the inferences to be drawn as is the trier of fact.¹⁰⁵ In reviewing the sufficiency of the evidence, the court should determine whether there is any evidence to support the conviction. If there is not, it need go no further to reverse. If, however, there is some circumstantial evidence, the court should accept the testimonial evidence most favorable to the State. If the circumstantial evidence supports a reasonable inference of innocence, as well as of guilt, the conviction should be reversed.¹⁰⁶

F. Expert Testimony

The Indiana Court of Appeals for the First District, in *Henderson v. State*,¹⁰⁷ extended the holding of *Smith v. State*¹⁰⁸ to allow

874 (1968), and was followed in *Banks v. State*, 257 Ind. 530, 276 N.E.2d 155 (1971).

¹⁰²*Wilson v. State*, 304 N.E.2d 824 (Ind. Ct. App. 1973), is illustrative of the application of the reasonable hypothesis of innocence test. The court reversed a conviction for theft of an automobile after reviewing the following facts. Defendant Wilson was involved in an accident while driving an automobile stolen by another person, Harlson, who was a friend of the true owner. Wilson lied at the scene and said that he was not driving the car and that Harlson was. This circumstantial evidence would not support the conviction because the court noted that Wilson had no driver's license in his possession and could have lied out of fear of arrest for that.

¹⁰³307 N.E.2d 73 (Ind. Ct. App. 1974) (third district).

¹⁰⁴Note, *Appellate Review of Circumstantial Evidence in Indiana Criminal Cases*, 7 IND. L. REV. 883, 892 (1974).

¹⁰⁵*Id.* at 898.

¹⁰⁶*Id.* at 899.

¹⁰⁷308 N.E.2d 710 (Ind. Ct. App. 1974).

¹⁰⁸285 N.E.2d 275 (Ind. 1972), noted in *Evidence*, 1973 *Survey of Indiana Law*, 7 IND. L. REV. 203 (1973).

an expert witness, testifying as to the defendant's insanity, to testify also as to information which he learned from an interview with the defendant's family. In *Henderson*, the trial court refused to let a defense expert, a psychologist, testify as to what he learned as the result of an interview with the family of the defendant. The court of appeals reversed. The appellate court cited the *Smith* case which allowed an expert to give his opinion concerning the defendant's sanity based in part on hospital records containing information supplied by persons not available for cross-examination. The hospital reports were admitted into evidence, not as evidence of the truth of the matters asserted therein, but only to give the jury an opportunity to consider, in evaluating the expert's credibility, the bases of the expert's opinion. An instruction limiting the use of the records was required.

The *Smith* case, which itself changed previous Indiana law allowing an expert to give an opinion based on information in evidence or in response to hypothetical questions, contained this express limitation: "The types of records and reports which can be utilized should only be those produced by qualified personnel and the type which an expert customarily relies on."¹⁰⁹ Clearly the information relied upon in *Henderson* was not produced by qualified personnel. The test for admission of this hearsay should be the same as for other types of hearsay. There must be both a sufficient indicia of reliability¹¹⁰ and a necessity for the use of the hearsay.

The necessity for the use of the statements in *Henderson* was wholly absent. The defendant's family could easily have been placed on the stand to relate the same information they told to the expert. The expert psychologist could then have testified on the basis of that information. This situation is in contrast to the need to use hospital records which may have been compiled over a period of years by many different staff members and doctors. Medical personnel are reluctant to spend time in the courtroom and, in recognition of the hardship of requiring each doctor to attend, the *Smith* case recognized the necessity for the use of hospital records. While it may be wise to admit underlying information used by an

¹⁰⁹285 N.E.2d at 276, citing *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1971). See *Richardson v. Perales*, 405 U.S. 389 (1971) (admissibility of written medical reports in Social Security disability determination hearing upheld). See also *White v. Zuell*, 263 F.2d 613 (2d Cir. 1959); *Long v. United States*, 59 F.2d 602 (4th Cir. 1932).

¹¹⁰Cf. *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1971) (hospital records used by an expert, which records contained statements made by the defendant's mother, were admissible).

expert in forming his opinion, the courts should not do so absent the reasons delineated in *Smith* for allowing hospital records.

G. Privilege—Plea Bargaining

In *Webster v. State*,¹¹¹ the supreme court stated that the admission of evidence of plea bargaining between the attorney for the defendant's accomplice and the prosecuting attorney was not a violation of the attorney-client privilege. The defendant attempted to elicit information about these plea negotiations in order to impeach the accomplice by showing that his testimony resulted from promises of leniency. The information defendant sought was not a conversation between an attorney and his client but one between the attorney and a third party.

This decision appears to limit *Hineman v. State*,¹¹² in which the court held that any communication or evidence relating to plea bargaining negotiations is privileged, and thus inadmissible, unless the defendant subsequently enters a plea of guilty which is not withdrawn.¹¹³ The *Hineman* case extended an earlier ruling of the court of appeals¹¹⁴ to include testimony about plea negotiations by the defendant as well as by the State. According to *Webster*, however, plea negotiations can properly be utilized for the limited purpose of impeaching a witness.¹¹⁵

¹¹¹302 N.E.2d 763 (Ind. 1973).

¹¹²292 N.E.2d 618 (Ind. Ct. App. 1973).

¹¹³*Id.* at 623.

¹¹⁴*Moulder v. State*, 289 N.E.2d 522 (Ind. Ct. App. 1972), noted in *Evidence*, 1973 *Survey of Indiana Law*, 7 IND. L. REV. 205 (1973).

¹¹⁵This is consistent with ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 3.4 (Approved Draft 1968), which the court in *Hineman* adopted. This sections provides in part:

[T]he fact that defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

Note that the section refers only to negotiations by the defendant. Note also that the negotiations should not be received as evidence against or in favor of the defendant. In *Webster*, the offer was not evidence "for" or "against" either party, but was merely impeachment evidence.

The Proposed Federal Rules of Evidence would exclude the use of the plea negotiation only if offered *against* the defendant. Clearly, its use for impeachment, as in *Webster*, is permitted. See Proposed Fed. R. Evid. 410. The Advisory Committee's note points out that "use for or against other persons will not impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster."

H. Judicial Notice

A most unusual procedure for establishing the physical characteristics of the defendant, which characteristics are necessary elements of a crime, was formulated in *Sumpter v. State*.¹¹⁶ The defendant was convicted at trial for living in a house of ill fame. The defendant did not take the stand and there was no testimony concerning her sex. The court of appeals reversed,¹¹⁷ holding that the prosecution failed to prove that defendant was a female, a required element of the crime charged. On petition to transfer, the supreme court modified prior law by holding that, when an individual is charged with an offense, an element of which is the sex of the accused, the presiding judge may take judicial notice of the defendant's sex. The judge's finding is not necessarily conclusive; once the judge takes judicial notice of the defendant's sex, a rebuttable presumption arises sufficient to constitute a *prima facie* case in favor of the State.¹¹⁸

Justice DeBruler, dissenting, found the majority's procedure unnecessary and an infringement on the defendant's right to have all the elements of the crime proved beyond a reasonable doubt. The procedure was unnecessary because it would have been a simple matter for the State to call a lay witness, for example, a female police officer, to state her belief as to defendant's sex. Justice DeBruler also felt that the court should be extremely reluctant to create a presumption, on an element of a crime defined by the legislature, which had the effect of carrying the State's case to the jury.

¹¹⁶306 N.E.2d 95 (Ind. 1974), *modifying on petition to transfer* 296 N.E.2d 131 (Ind. Ct. App. 1973). For a discussion of the use of reputation testimony to prove the offense of living in a house of ill fame, see notes 78-80 *supra* and accompanying text.

¹¹⁷*Sumpter v. State*, 296 N.E.2d 131 (Ind. Ct. App. 1973). The court of appeals relied on a case which had held that, when age is a required element of a crime, the record must reflect the defendant's age and neither the jury nor the court is free to form an opinion by observing the defendant sitting in the court room. If the defendant takes the stand, the jury is then free to observe his demeanor and other characteristics to arrive at some conclusion about his age. *See Watson v. State*, 236 Ind. 329, 140 N.E.2d 109 (1957). The reason for this rule is to prohibit the jury from considering any material not properly introduced into evidence. "To let the bars down and turn the jury loose to seek its own information where it cares to find it, would open a Pandora's box of innumerable injustices in verdicts rendered." *Id.* at 337, 140 N.E.2d at 112. The court of appeals distinguished *Howard v. State*, 257 Ind. 166, 272 N.E.2d 870 (1971), also involving a conviction for living in a house of ill fame, because in that case a police woman testified that she had seen the defendant partially undressed and that she believed that the defendant was a female.

¹¹⁸306 N.E.2d at 99.

This was especially true of the offense in question, the "most fundamental element" of which was the sex of the defendant.

Even though the supreme court sanctioned judicial notice of a defendant's sex, it is still safer for the State to put a witness on the stand and elicit from the witness an opinion as to a defendant's sex. This would alleviate any defendant's contention that she did not know that the court had taken judicial notice of her sex and would prevent appeals over the procedural burden facing the defendant in such cases. In any event, if the trial court takes judicial notice of the defendant's sex, it should place such notice on the record. If the court does not do so on its own motion, the prosecuting attorney should request the court to put such notice on the record.

X. Insurance

*G. Kent Frandsen**

This Note reviews the most significant insurance cases decided by the Indiana courts within the past year. For the most part, the issues presented involved construction of policy language and legislative intent. It is sufficient to note that the courts were not ambivalent in exercising their judgment in this area of law. As the following cases indicate, the element of reasonableness was given a rather high priority when consumer expectations conflicted with prolix policy language.

A. *Fraudulent Misrepresentation of Insuring Agreement*

One interesting case decided this past year by the Indiana Court of Appeals should serve as a caveat to the insurance industry to deal in good faith with its insureds. In *Physicians Mutual Insurance Co. v. Savage*,¹ the court of appeals held that misrepresentations by an insurer's agent can support a specific finding of fraud. This finding justified an award of substantial exemplary damages in an action on the contract. In this case, the executor of the insured's estate notified the insurance company of the insured's death and requested claim and proof of death forms. The insured had been fatally injured while operating an automobile and a blood test taken

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The author wishes to express his appreciation for the able assistance of Robert L. Hartley, Jr.

¹296 N.E.2d 165 (Ind. Ct. App. 1973).

shortly after the injury revealed that she had a .21 percent blood alcohol content at the time of the accident. The insurer had issued a hospital expense and accident policy to the decedent which contained a rider providing for a \$10,000 accidental death benefit. The policy issued to the insured contained the following exclusion: "This policy does not cover any loss caused by or resulting from . . . (6) mental disorder, alcoholism or drug addiction."² After an exchange of correspondence between the insurer and the executor, one of the insurer's agents visited the executor and misrepresented that the rider to the policy contained an exclusion denying liability in the event the insured was intoxicated at the time of her death.³ Although, at that time, the executor was unaware that the rider shown to him by the agent was substantially different from the one actually attached to the policy, he wisely rejected an offer to settle for \$1,000. Thereafter, an action seeking the \$10,000 face value of the rider and exemplary damages for the insurer's wrongful and willful denial of its contractual obligations was filed by the executor.

The trial court made a specific finding that the insurer had, through its agent, knowingly perpetrated a fraud on the plaintiff by substituting another contract of insurance for the contract of insurance entered into and by denying insurance coverage for accidental death. The court therefore awarded the executor \$50,000 in exemplary damages in addition to a recovery of the face value of the rider. On appeal, Judge Robertson, speaking for a unanimous court, affirmed the judgment of the trial court and held that there was sufficient evidence of probative value to establish the common law elements of fraud.⁴ The court held that the element of scienter was a question for the trier of fact and that it could be inferred from statements made recklessly.⁵

²*Id.* at 167.

³The purported rider contained the following exclusion: "Injury sustained in consequence of the Insured's being intoxicated or under the influence of any narcotic unless administered on the advice of a physician." *Id.* The court noted the substantial distinction between being an alcoholic and being intoxicated.

⁴The court cited *Capitol Dodge, Inc. v. Haley*, 288 N.E.2d 766 (Ind. Ct. App. 1972), for the elements of fraud and said:

For all practical purposes, the representation and the falsity . . . are admitted, . . . [and] the record reveals evidence from which the trier of fact could reasonably infer the existence of scienter, deception and injury.

296 N.E.2d at 169.

⁵*See Capitol Dodge, Inc. v. Haley*, 288 N.E.2d 766 (Ind. Ct. App. 1972); *Jordanich v. Gerstbauer*, 287 N.E.2d 784 (Ind. Ct. App. 1972). *See also Automobile Underwriters, Inc. v. Smith*, 131 Ind. App. 454, 166 N.E.2d 341 (1960).

The general rule that exemplary damages are not recoverable in contract actions⁶ was not applicable because the trial court made a specific finding of fraud. Therefore, the court of appeals was justified in upholding the award of exemplary damages.⁷ In response to the insurer's contention that \$50,000 was excessive, the court recognized that the purpose of such an award is not merely to compensate the injured party, but rather is to deter similar wrongful conduct.⁸ In light of the substantial net worth of the insurer,⁹ the court concluded the award was not an abuse of discretion.¹⁰

B. Uninsured Motorist Coverage

1. Exclusion Void as Against Public Policy

In 1955, as a means of forestalling compulsory liability insurance and unsatisfied judgment funds, the automobile insurance industry instituted a campaign of expanding the coverage of the standard automobile policy to include uninsured motorist coverage (UMC).¹¹ Indiana requires UMC under a statute enacted in 1965 which provides in part:

No automobile liability or motor vehicle liability policy or insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state . . . unless coverage is provided therein or supplemental thereto . . . for the protection of persons insured thereunder who are legally entitled to recover dam-

⁶Standard Land Corp. v. Bogardus, 289 N.E.2d 803 (Ind. Ct. App. 1972); Hedworth v. Chapman, 135 Ind. App. 129, 192 N.E.2d 649 (1963).

⁷Voelkel v. Berry, 139 Ind. App. 267, 218 N.E.2d 924 (1966); Hedworth v. Chapman, 135 Ind. App. 129, 192 N.E.2d 649 (1963); Murphy Auto Sales, Inc. v. Coomer, 123 Ind. App. 709, 112 N.E.2d 589 (1953); cf. Jerry Alderman Ford Sales, Inc. v. Bailey, 291 N.E.2d 92 (Ind. Ct. App. 1972).

⁸296 N.E.2d at 169. See Capitol Dodge, Inc. v. Haley, 288 N.E.2d 766 (Ind. Ct. App. 1972).

⁹The insurer's Statement of Condition disclosed total assets in excess of \$37,000,000 and total liabilities in excess of \$28,000,000.

¹⁰But cf. Bangert v. Hubbard, 127 Ind. App. 579, 126 N.E.2d 778 (1955) (punitive damages in a malicious prosecution action were held excessive because they were not reasonably proportioned to the amount of compensatory damages).

¹¹A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE (1969) is a comprehensive treatise concerning the uninsured motorist protection endorsement. Chapter 1 of this treatise describes in detail the origins of the coverage. Also, see Laufer, *Insurance Against Lack of Insurance? A Dissent from the Uninsured Motorist Endorsement*, 1969 DUKE L.J. 227, for a brief but well written description of the endorsement.

ages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.¹²

A further provision of the statute allows any insured to reject UMC, but only if the rejection is in writing.¹³ Few insureds are aware of this option, if, in fact, they are even aware of the scope of their UMC. In essence, it is a quasi-form of mandatory first party insurance.¹⁴ Proponents of mandatory first party insurance such as modified-fault plans, more commonly known as no-fault automobile liability insurance, may well reserve their enthusiasm upon reviewing the cases involving UMC. The suggestions that, under first party coverage, the insurers are conscious of the importance of accommodating their insureds through prompt settlements and are inclined to resolve differences in favor of their insureds, appear illusory after reviewing some recent decisions involving UMC.

In *State Farm Mutual Insurance Co. v. Robertson*,¹⁵ the court of appeals reaffirmed its posture of rejecting policy language which conflicts with and is more restrictive than statutes enacted for the protection of persons insured. The underlying purpose of UMC was the basis for the court's holding that a policy exclusion which restricted UMC protection was void as contrary to public policy. In *Robertson*, the insured's son, a member of the insured's household, was fatally injured as a result of being struck by an uninsured vehicle. At the time of the accident, the son was operating a motorcycle owned by the insured, but which was not listed as an insured vehicle in the policy issued by State Farm. The father brought a wrongful death action against the driver of the uninsured automobile and obtained a judgment. This judgment was not satisfied and Robertson's subsequent claim under the UMC provision was denied by State Farm based on the following exclusion contained in its policy:

¹²IND. CODE § 27-7-5-1 (IND. ANN. STAT. § 39-4310, Burns 1965).

¹³*Id.*

¹⁴First party insurance is a term used extensively within the industry to distinguish coverage, such as collision, comprehensive, medical payments and uninsured motorist protection, from public liability coverage which is commonly referred to as third party insurance. In first party insurance, if there is a loss, the insured deals with his insurer for purposes of indemnification. In third party insurance, the injured person looks to the tortfeasor's insurer for compensation of the alleged injuries or loss.

¹⁵295 N.E.2d 626 (Ind. Ct. App. 1973). For other recent Indiana cases involving UMC, see *Vantine v. Aetna Cas. & Sur. Co.*, 335 F. Supp. 1296 (N.D. Ind. 1971); *Cannon v. American Underwriters, Inc.*, 275 N.E.2d 567 (Ind. Ct. App. 1971); *Ely v. State Farm Mut. Auto. Ins. Co.*, 148 Ind. App. 586, 268 N.E.2d 316 (1971); *Patton v. Safeco Ins. Co. of America*, 148 Ind. App. 548, 267 N.E.2d 859 (1971); *Indiana Ins. Co. v. Noble*, 148 Ind. App. 297, 265 N.E.2d 419 (1970).

Insuring Agreement III (uninsured motorist coverage) does not apply: . . . b) to bodily injury to an insured while occupying or through being struck by a land motor vehicle owned by the named insured or resident of the same household, if such vehicle is not an "insured vehicle."¹⁶

Citing case authority that announced the following principles, the court stated that the provisions of the statute must be considered a part of every automobile liability policy whether written specifically therein or not,¹⁷ that uninsured motorist legislation is remedial in nature and should be liberally construed,¹⁸ and further, that the statute is for the protection of *persons* insured, irrespective of the insured's proprietary or insurance interest in the vehicle he happens to be occupying, and is not limited to *persons injured while operating or occupying an insured automobile*.¹⁹ In light of these principles, the court held that the policy exclusion limiting the coverage afforded by the statute was invalid.²⁰

2. UMC Set-Off Provision Void

In *Leist v. Auto Owners Insurance Co.*,²¹ the Second District Court of Appeals considered a policy provision reducing any loss payable under UMC by amounts paid or payable under any workmen's compensation law.²² *Leist* was injured while operating his employer's vehicle and was paid \$11,976.12 under the employer's workmen's compensation policy. Auto Owners insured the employer

¹⁶295 N.E.2d at 628.

¹⁷*Indiana Ins. Co. v. Noble*, 148 Ind. App. 297, 265 N.E.2d 419 (1970).

¹⁸*Cannon v. American Underwriters, Inc.*, 275 N.E.2d 567 (Ind. Ct. App. 1971); *Indiana Ins. Co. v. Noble*, 148 Ind. App. 297, 265 N.E.2d 419 (1970). See also *Riehl v. National Mut. Ins. Co.*, 374 F.2d 739 (7th Cir. 1967); *State Farm Mut. Auto. Ins. Co. v. American Underwriters, Inc.*, 371 F.2d 999 (7th Cir. 1967); *Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152 (S.D. Ind. 1970).

¹⁹*Vantine v. Aetna Cas. & Sur. Co.*, 335 F. Supp. 1296 (N.D. Ind. 1971); *Cannon v. American Underwriters, Inc.*, 275 N.E.2d 567 (Ind. Ct. App. 1971); *Patton v. Safeco Ins. Co. of America*, 148 Ind. App. 548, 267 N.E.2d 859 (1971).

²⁰295 N.E.2d at 629. Accord, e.g., *Vantine v. Aetna Cas. & Sur. Co.*, 335 F. Supp. 1296 (N.D. Ind. 1971); *Doxater v. State Farm Mut. Auto. Ins. Co.*, 8 Ill. App. 3d 547, 290 N.E.2d 284 (1972); *Shipley v. American Standard Ins. Co.*, 183 Neb. 109, 158 N.W.2d 238 (1968).

²¹311 N.E.2d 828 (Ind. Ct. App. 1974).

²²

Any loss payable . . . to or for any person shall be reduced by (c) the amount paid and the present value of all amounts payable to him under any workmen's compensation law

Id. at 830.

for both workmen's compensation and automobile liability. Auto Owners sought and obtained a declaratory judgment and injunction restraining Leist from seeking, by arbitration, damages under the automobile liability policy's UMC provision. The maximum amount payable under UMC was \$10,000. The trial court held that Auto Owners could set off the workmen's compensation recovery against any UMC recovery, and since the workmen's compensation recovery exceeded any possible UMC recovery, arbitration would be useless. The court also held that under Indiana's workmen's compensation statute ²³ Auto Owners was subrogated to Leist's UMC recovery to the extent of \$11,976.12, and for this additional reason arbitration would be useless.

The Indiana Court of Appeals reversed. The court decided that since the Indiana UMC statute ²⁴ sets minimum limits below which coverage may not go,²⁵ the policy provision for set-off of workmen's compensation benefits was in derogation of the UMC statute and therefore void. With regard to Auto Owners' right of subrogation under Indiana's workmen's compensation statute, the court noted that the statutory right of subrogation does not ripen until there is a judgment, settlement or a refusal by the insured to assert his right of recovery.²⁶ Since this action arose prior to Leist's obtaining a judgment under UMC, the court held that any right of subrogation in Auto Owners had not ripened.²⁷

²³IND. CODE § 22-3-2-13 (Burns 1974).

²⁴*Id.* § 27-7-5-1. (IND. ANN. STAT. § 39-4310, Burns Supp. 1974).

²⁵*Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152 (S.D. Ind. 1970); *Cannon v. American Underwriters, Inc.*, 275 N.E.2d 567 (Ind. Ct. App. 1971); *Patton v. Safeco Ins. Co. of America*, 148 Ind. App. 548, 267 N.E.2d 859 (1971); *Indiana Ins. Co. v. Noble*, 148 Ind. App. 297, 265 N.E.2d 419 (1970).

²⁶

[I]f the action against such other person is brought by the injured employee or his dependents and judgment is obtained and paid, and accepted or settlement is made . . . then from the amount received . . . there shall be paid to the employer, or such employer's compensation insurance carrier, the amount of compensation paid to such employee

IND. CODE § 22-3-2-13 (Burns 1974).

²⁷In so holding, the court avoided the interesting issue of whether the workmen's compensation insurer's right of subrogation extends to all amounts recovered by an injured employee regardless of their source, or whether the right of subrogation only extends to amounts recovered in tort. However, the implication of the court's holding is that, after Leist obtains a judgment entitling him to UMC recovery, Auto Owners will be subrogated to his recovery despite the fact that the recovery results from a contract action rather than a tort action.

3. "Stacking" Benefits

In 1970, the United States District Court for the Southern District of Indiana allowed an insured to recover the full policy limits under the UMC provisions of two separate policies, each of which covered a separate vehicle owned by the insured.²⁸ The question of "stacking" of benefits had not previously been presented to the Indiana courts. In *Jeffries v. Stewart*,²⁹ the Indiana Court of Appeals permitted "stacking" of UMC benefits and medical payments under a single policy which insured three separate vehicles. The insured obtained a \$30,000 judgment against his uninsured tortfeasor. The insured joined his own insurer in the action and the trial court held that the insurer's liability was limited to \$10,000 under UMC and \$500 in medical payments. The insured appealed. Rejecting the holdings of courts in several other jurisdictions³⁰ which denied the "stacking" of benefits when the insured had multiple coverage under a single policy, the appellate court reversed. It held that since the policy covered three separate vehicles, the benefits could be "stacked" and the insured could recover up to \$30,000 under UMC and \$1500 in medical payments. The appellate court expressly did not base its decision on Indiana's uninsured motorist statute.³¹ Rather, the court rested its decision on an ambiguity resulting from conflicting policy provisions and, of course, resolved the ambiguity in favor of the insured.³² The policy provisions in conflict were the separability condition providing that "[w]hen two or more automobiles are insured hereunder, the terms of this policy shall apply

²⁸*Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152 (S.D. Ind. 1970). Judge Dillin reasoned that if the question were presented to the Indiana courts they would adopt the majority view permitting aggregation of benefits since the UMC statute fixed minimum, not maximum, requirements of coverage, since any attempt of an insurer to limit the effect of the statute would be in derogation of the statute, and since it would be unconscionable to permit the insurers to collect a premium for coverage they are required to provide and then to avoid payment of a loss because of limiting language in their policies.

²⁹309 N.E.2d 448 (Ind. Ct. App. 1974).

³⁰*Allstate Ins. Co. v. Shmitka*, 12 Cal. App. 3d 59, 90 Cal. Rptr. 399 (1970); *Otto v. Allstate Ins. Co.*, 2 Ill. App. 3d 58, 275 N.E.2d 766 (1971); *Allstate Ins. Co. v. McHugh*, 124 N.J. Super. 105, 304 A.2d 777 (1973). In *Allstate Ins. Co. v. Mole*, 414 F.2d 204 (5th Cir. 1969), and *Polland v. Allstate Ins. Co.*, 25 App. Div. 2d 16, 266 N.Y.S.2d 286 (1966), aggregation of benefits was denied with respect to liability coverage.

³¹IND. CODE § 27-7-5-1 (IND. ANN. STAT. § 39-4310, Burns Supp. 1974).

³²*See O'Meara v. American States Ins. Co.*, 148 Ind. App. 563, 268 N.E.2d 109 (1971); *United States Fidel. & Guar. Co. v. Baugh*, 146 Ind. App. 583, 257 N.E.2d 699 (1970). The test is whether reasonably intelligent men, upon reading the contract, would honestly differ as to its meaning.

separately to each"³³ and the limits of liability provision limiting liability to \$10,000 for each person and \$20,000 for each accident.³⁴ The court stated:

We cannot determine whether the limit of liability clause is a part of each of the three policies effectuated by the separability clause, or whether it is meant to apply to the single contract of insurance issued to Jeffries.³⁵

The court also supported its decision by the fact that Jeffries paid three separate premiums for UMC and medical coverage. Of greatest interest to the insurance industry is the fact that the court in *Jeffries* apparently recognized that proper draftsmanship might avoid the problem altogether, either by having the separability clause by its express terms not apply to UMC,³⁶ or by making it clear that the limits of liability are absolute irrespective of the number of vehicles insured under the policy.³⁷

C. "Other Insurance" Clauses

Cumulative coverage in automobile liability insurance policies has produced its own Alphonse and Gaston act.³⁸ Not infrequently, claims arise when "A" while driving "B's" automobile negligently causes injury to "C". Both "A" and "B" have public liability coverage under policies issued by different carriers. On the surface, it appears that the injured person should have access through the tortfeasor to two separate resources which could compensate him for his injuries. However, insurance companies have attempted to limit their liability when their insureds have access to other collectible insurance by the use of "other insurance" provisions which

³³309 N.E.2d at 450.

³⁴*Id.* at 451.

³⁵*Id.* at 453.

³⁶*Morrison Assurance Co., Inc. v. Polak*, 230 So. 2d 6 (Fla. 1969); *Dhane v. Trinity Universal Ins. Co.*, 497 S.W.2d 323 (Tex. Civ. App. 1973). *But see* *Sturdy v. Allied Mut. Ins. Co.*, 203 Kan. 783, 457 P.2d 34 (1969); *Lipscombe v. Security Ins. Co.*, 213 Va. 81, 189 S.E.2d 320 (1972).

³⁷*Hilton v. Citizens Ins. Co.*, 201 So. 2d 904 (Fla. App. 1967).

³⁸*In Fireman's Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 411 P.2d 271 (Ore. 1966), the court stated:

This court believes it is good public policy not to put an injured plaintiff, or a defendant who is fortunate enough to have duplicate coverage, in a position where there is any possibility one insurer can say, "After you my dear Alphonse!" while the other says, "Oh, no, after you, my dear Gaston." They must walk arm in arm through the door of responsibility.

Id. at 274.

may contain either pro-rata clauses,³⁹ excess coverage clauses,⁴⁰ or escape clauses.⁴¹ In the area of "other insurance" clauses, the attempt to achieve standardization and uniformity of policy language has fallen short of expectations.⁴²

An issue of first impression for the Supreme Court of Indiana was presented in the case of *Indiana Insurance Co. v. American Underwriters, Inc.*⁴³ The question raised was whether the automobile owner's insurer or the driver's insurer should bear primary liability when both insureds had a policy covering the accident. The owner's policy contained an escape clause and the driver's contained an excess coverage clause.

In the decision below,⁴⁴ the appellate court applied what it termed the majority rule that, all else being equal, primary liability should fall on the automobile owner's insurer rather than on the operator's insurer.⁴⁵ This rule apparently resulted from a misinterpretation of the view enunciated in *Zurich General Accident & Liability Insurance Co. v. Clamor*,⁴⁶ which the appellate court recognized as the majority view.⁴⁷ The *Zurich* approach assigns primary liability by applying rules of construction to the insurance contracts and determining which policy more specifically assumes or excludes the risk of loss. A proper application of the *Zurich* approach clearly would not result in a hard and fast rule such as the one applied by the appellate court.⁴⁸ The appellate court's rule may be preferable, however, since the *Zurich* approach could lead to unending litigation to interpret newly drafted or revised "other insurance" provisions.

³⁹A pro-rata clause restricts the liability of concurrent insurers to an apportionment basis.

⁴⁰An excess coverage clause restricts the insurer's coverage to the amount due the insured over and above another insurer's policy limits.

⁴¹An escape clause avoids all liability in the event of other insurance.

⁴²For a good discussion of "other insurance" clauses and the conflicts which may arise between them, see 46 IND. L.J. 270 (1971).

⁴³304 N.E.2d 783 (Ind. 1973).

⁴⁴*Indiana Ins. Co. v. American Underwriters, Inc.*, 290 N.E.2d 784 (Ind. Ct. App. 1972).

⁴⁵The trial court applied the rule that the driver's insurer was primarily liable. *Id.* at 785.

⁴⁶124 F.2d 717 (7th Cir. 1942).

⁴⁷*Indiana Ins. Co. v. American Underwriters, Inc.*, 290 N.E.2d 784, 786 (Ind. Ct. App. 1972).

⁴⁸In *Zurich*, the court found that an excess clause was more specific than an escape clause. Thus, under the *Zurich* approach, the owner's insurer would be primarily liable only if the owner's policy contained an escape clause. However, if the driver's policy contained the escape clause, *Zurich* would hold the driver's insurer primarily liable.

The Indiana Supreme Court reversed, rejecting the rule applied by the trial court,⁴⁹ the rule applied by the appellate court,⁵⁰ and the *Zurich* approach. As Judge Beamer predicted,⁵¹ the court adopted the minority view and held that whenever "other insurance" clauses conflict they are to be disregarded. The insurers share dual primary liability, prorated according to the limits of each policy. The court noted that the original purpose for "other insurance" clauses was to discourage overinsurance and the resultant temptation for self-injury. This purpose has little relevance today in the field of public automobile liability coverage. Further, the dual concerns of seeing that insureds receive a *quid pro quo* for the payment of premiums and that injuries are redressed are more important than giving judicial sanction to the artistry of the policy draftsman.

D. Mortgage Clauses

In *Federal National Mortgage Association v. Great American Insurance Co.*,⁵² the appellate court was faced with the distinction between an "open or loss payable" clause⁵³ and a "union or standard mortgage" clause⁵⁴ in a fire insurance policy. The clause in question provided:

Loss . . . shall be payable to the mortgagee . . . and this insurance as to the interest of the mortgagee (or trustee) only therein, *shall not be invalidated by any act or neglect of the mortgagor or owner . . . nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property . . .*⁵⁵

Reversing the trial court, the appellate court followed well estab-

⁴⁹See note 45 *supra*.

⁵⁰See text accompanying note 45 *supra*.

⁵¹In *Allstate Ins. Co. v. American Underwriters, Inc.*, 312 F. Supp. 1386 (N.D. Ind. 1970), Judge Beamer was faced with a conflict between "other insurance" clauses and, in the absense of any Indiana case law on the subject, ignored the clauses and prorated liability between the insurers.

⁵²300 N.E.2d 117 (Ind. Ct. App. 1973).

⁵³

Under a simple loss-payable or open-mortgage clause, the mortgagee is simply an appointee to receive the insurance fund recoverable in case of loss to the extent of his interest, and his right of recovery is no greater than the right of the mortgagor.

11 G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 42:660 (2d ed. R. Anderson 1963).

⁵⁴These terms are used interchangeably to denote a clause which purports to protect the mortgagee by creating a separate contract between the insurer and mortgagee. *Id.* § 42:649.

⁵⁵300 N.E.2d at 118 (emphasis added).

lished authority⁵⁶ and held that the language emphasized above was that of a "union or standard mortgage" clause, thereby creating a separate contract of insurance between the insurer and the mortgagee.

Having decided this issue, the court was then faced with the question of how much coverage was extended to the mortgagee when the loss occurred after he purchased the property at the foreclosure sale. The insurer contended its liability was limited to any deficiency remaining after the foreclosure sale. The mortgagee contended that it should recover the entire value of its interest in the property, limited only by the face amount of the policy and the preforeclosure debt. Again reversing the trial court, the court decided this question in favor of the mortgagee.⁵⁷ This result would appear to be a proper application of the policy language.

E. Statutory Developments

In addition to several statutory amendments, primarily of a technical nature pertaining to the business of insurance, the 1974 General Assembly adopted two noteworthy amendments. This year, the legislature deleted the limitation on the extent of group life insurance that may be taken out on the life of any person by an employer, labor union or voluntary trade association.⁵⁸ Also of particular significance was a change affecting benefits payable under group hospital, medical or surgical expense policies. No such policy issued or renewed on or after January 1, 1975, may contain any provision reducing or coordinating benefits payable under the policy solely because similar benefits are payable under an *individual* policy of accident or sickness insurance.⁵⁹ Further, should the insured have other *group-type* accident and sickness insurance poli-

⁵⁶Northwestern Nat'l Ins. Co. v. Mildenberger, 359 S.W.2d 380 (Mo. App. 1962); Prudential Ins. Co. v. German Mut. Fire Ins. Ass'n, 231 Mo. App. 699, 105 S.W.2d 1001 (1937); Haskin v. Greene, 205 Ore. 140, 286 P.2d 128 (1955).

⁵⁷The mortgagee purchased the property at the foreclosure sale for \$13,900, which left \$213.01 of the foreclosure debt unsatisfied. The face value of the fire policy was \$10,000. Thus the question was not presented of whether the mortgagee could recover in excess of the foreclosure judgment had the face of the policy exceeded that amount.

⁵⁸IND. CODE § 27-1-12-27 (IND. ANN. STAT. § 39-4221, Burns Supp. 1974), as amended by Ind. Pub. L. No. 122 (Feb. 14, 1974). This section had limited death benefits under a group life policy or combination of policies issued through an employer, labor union or voluntary trade association to \$25,000 unless 200 percent of the annual compensation of the insured exceeded \$25,000. In no event could benefits exceed the lesser of \$75,000 or 200 percent of the insured's annual compensation.

⁵⁹IND. CODE § 27-8-5-10 (IND. ANN. STAT. § 39-4260, Burns Supp. 1974), as amended by Ind. Pub. L. No. 125 (Feb. 20, 1974).

cies, the insurers may not reduce benefits payable under their policies below an amount equal to one hundred percent of total allowable expenses.⁶⁰

F. Conclusion

Certainly the courts' refusals to allow policy restrictions which defeat laymen's expectations of coverage will result in a return to the drawing boards by the policy draftsmen. Further, it is likely that the industry will intensify its lobbying efforts for more favorable legislation. However, it occurs to this writer that until there is a major effort on the part of the insurance industry to strengthen its public image, litigation concerning the business of insurance will increase. A giant step forward would be achieved should the industry devote as much attention to the supervision of policy marketing as it has employed in drafting intricate insurance contracts. In this era of consumer protection, the judiciary should and will respond with equal solicitude for those unjustly denied benefits afforded them under their insurance policies as they do for persons injured through the use of defective products.

XI. Property

Ronald W. Polston*

This was not an active year for the Indiana courts in the area of real property law.¹ There are a few cases worthy of note, however, not because they represent any significant advances in the law, but because they represent failures to bring the law up to date in areas in which there was a need to do so. This was particularly true of *Booher v. Richmond Square, Inc.*,² in the landlord-tenant area, and to a lesser extent of *Pulos v. James*,³ which dealt with land use controls. Two other cases, *Continental Enterprises, Inc. v.*

⁶⁰During the transition period, litigation is almost certain to arise to determine which insurer is primarily liable when one policy is subject to the amending provision and another is exempt because its renewal date has not yet been reached.

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¹Many cases which, in the broadest sense, relate to real property are treated in other parts of this survey; for example, *Skendzel v. Marshall*, 301 N.E.2d 641 (Ind. 1973), is treated in the section on Secured Transactions.

²310 N.E.2d 89 (Ind. 1974).

³302 N.E.2d 768 (Ind. 1973).

*Cain*⁴ and *Selvia v. Reitmeyer*,⁵ although correctly decided, demonstrate a need for specific legislation in the easement area.

In *Booher v. Richmond Square, Inc.*,⁶ the court held, in overruling a defense of *res judicata*, that a landlord, after abandonment of the premises by the tenant, is entitled to bring successive suits for rent installments as they come due. The landlord sought to recover rental installments for the period from October 30, 1969, to September 30, 1971. The landlord previously had recovered a judgment for rent up to October 29, 1969. The previous judgment was asserted, unsuccessfully, as a bar to the instant suit. In overruling the defense of *res judicata* the court was, of course, being consistent with previous Indiana cases, and cases in most other jurisdictions, which regard a lease as a conveyance rather than a contract. Under the conveyance view, upon abandonment by the lessee, the landlord has no obligation to mitigate damages⁷ and, in fact, may not be able to do so without terminating the lessee's obligations under the lease.⁸ He may allow the property to lie idle and sue for rental installments as they come due.⁹ In fact, he may not be able to utilize the doctrine of anticipatory repudiation to bring his suit at once upon abandonment.¹⁰ When he sues, the measure of damages is the rent reserved.¹¹ All of this is consistent with the idea that the landlord has conveyed a property interest to the lessee and the lessee has an obligation to pay for that interest. Since the property belongs to the lessee during the term of the lease, the landlord has no obligation upon abandonment by the lessee to attempt to lease it to another. In fact, if the landlord exercises any dominion over the property, the effect may be to terminate the lessee's interest. Since the rent obligation "grows out of the land," the lessee would have no further duties under the lease, not even the obligation to respond in damages for his breach.

The application of contract law would lead to an entirely different result in this situation. Under contract law, if the lessee abandoned the premises and repudiated the lease, the lessor would immediately have a single cause of action for damages.¹² He could recover the difference between the contract price (rent reserved)

⁴296 N.E.2d 170 (Ind. 1973).

⁵295 N.E.2d 869 (Ind. 1973).

⁶310 N.E.2d 89 (Ind. 1974).

⁷*Patterson v. Emerick*, 21 Ind. App. 614, 52 N.E. 1012 (1899); *Aberdeen Coal & Mining Co. v. City of Evansville*, 14 Ind. App. 621, 43 N.E. 316 (1896).

⁸*Paxton Realty Corp. v. Peaker*, 212 Ind. 480, 9 N.E.2d 96 (1937).

⁹*Booher v. Richmond Square, Inc.*, 310 N.E.2d 89 (Ind. 1974).

¹⁰*Id.* at 92.

¹¹*Id.*

¹²RESTATEMENT OF CONTRACTS §§ 318 & 349, comment *e* at 597 (1932); 4 A. CORBIN, CONTRACTS § 954, at 832 (1951).

and the fair market value of the services not yet furnished (the reasonable rental value of the premises).¹³ The rights of the parties would thus be settled immediately and the landlord would be free to rent the property to others. Indeed, if he failed to do so, the loss would be his. The modern tendency is to regard the lease as a contract to provide real property to a lessee.¹⁴ Under this theory, the landlord has a continuing obligation under an installment contract. The fact that the lessee has an interest in real property is only incidental to the contract and, if the lessee breaches and repudiates, the fact that his property interest terminates is not allowed to obscure the fact that he is liable for breach of contract. In determining the lessee's liability, contract principles of anticipatory repudiation, mitigation of damages and measure of damages are utilized. The result is fairer to both landlord and tenant. The dispute is quickly resolved. The landlord must see that the property is utilized and yet he is entitled to those damages he actually has suffered.

These contract principles should, however, be adopted as a package by any court considering their application to the landlord-tenant situation. To permit the landlord to utilize anticipatory repudiation unless he is also limited to a contract measure of damages would be worse than the present system, for to do so would be to permit him to recover in advance all future rentals. To adopt a rule requiring the landlord to mitigate his damages, without at the same time applying principles of repudiation, would not produce any fairer results than present law provides. In fact, it might make matters worse because it might require that the landlord wait until the end of the term to sue in order to determine the difference between rent reserved and the rent received in the effort to mitigate.¹⁵ The *Booher* case provided the Indiana courts with an excellent opportunity to adopt the contract package. By upholding the plea of *res judicata* the court could have made it clear that contract principles control in the landlord-tenant situation.¹⁶

In the area of land use controls the Indiana Supreme Court, in *Pulos v. James*,¹⁷ held unconstitutional a statute which gave an

¹³Hawkinson v. Johnston, 122 F.2d 724 (8th Cir. 1941).

¹⁴See Harvey, *A Study to Determine Whether the Rights and Duties Attendant Upon the Termination of a Lease Should Be Revised*, 54 CALIF. L. REV. 1141, 1183 (1966).

¹⁵See *Hermitage Co. v. Levine*, 248 N.Y. 333, 162 N.E. 97 (1928), in which it was held that a clause in a lease providing for mitigation of damages required the landlord to wait twenty years to bring his action in order to insure that proper credit was given the lessee for rentals received in the attempt to mitigate.

¹⁶See RESTATEMENT OF CONTRACTS § 449 (1932).

¹⁷302 N.E.2d 768 (Ind. 1973).

administrative body the power to vacate a plat and to make any "change or amendment [of] any recorded covenant or restriction."¹⁸ In two cases consolidated for appeal, the Planning Committee of the Metropolitan Plan Commission of Marion County vacated plat restrictions which limited the use of the property to single family residences. Persons whose property was benefited by such restrictions questioned the constitutionality of the Planning Committee's action. The question presented was whether the benefit of a restrictive covenant is property within the meaning of constitutional provisions which prohibit the taking of property without compensation.¹⁹ The court followed a respectable, but not unanimous, line of authority and held that the benefit side of a restrictive covenant is an interest in real property.

There can be no doubt that restrictive covenants create interests which are appurtenant to and pass with conveyances of both the burdened and benefited land. Such interests are sometimes referred to as negative easements because, just as in the easement situation, they create non-possessory rights in the land of others. In the easement situation, the benefited party has an affirmative right to make some use of the burdened land. In the restrictive covenant situation, however, the benefited party has a right to demand that the burdened party not make a particular use of his land. Thus, restrictive covenants create property rights in much the same sense as easements. This does not necessarily mean, however, that any governmental interference with such rights amounts to a taking of property in the constitutional sense.

It is true that some courts have held that when a governmental body condemns a tract of land subject to restrictive covenants and seeks to use the property in a manner inconsistent with the restrictions, it must pay compensation to those who own the benefit side of the covenants.²⁰ A number of courts, however, have held otherwise in such situations,²¹ indicating that even if there is a direct taking and the governmental body has no interest other than acquisition of the burdened property for a use inconsistent with the covenants, these negative rights are not entitled to constitutional protection. Furthermore, the courts themselves have recognized that limits must be placed on the freedom of individuals to create such rights. The courts will, for example, act to relieve property of the

¹⁸*Id.* at 770.

¹⁹U.S. CONST. amend. XIV; IND. CONST. art. 1, §§ 21, 23.

²⁰*See* *United States v. Certain Lands in the City of Augusta*, 220 F. Supp. 696 (S.D. Me. 1963), and cases cited therein.

²¹*See* *Arkansas State Highway Comm'n v. McNeill*, 381 S.W.2d 425 (Ark. 1964), and cases cited therein.

burden of restrictive covenants when an area is so changed that it would be unjust to continue to enforce them.²²

Since courts can terminate the obligation of these covenants and, since there is disagreement as to whether the executive and legislative branches of government need pay compensation even if the governmental purpose is simply to confiscate such rights, there seems to be little reason why the executive and legislative branches cannot validly terminate such rights upon the basis of a judgment that the public interest demands it. The policy purpose of Indiana Code section 18-5-10-41, the statute under attack in *Pulos*, was obvious. The power to vacate restrictions was given to an administrative body charged with land use planning. The power of such bodies to interfere with private rights for purposes of controlling land use is well established, the justification being the police power of the state.²³ Nevertheless, while there is agreement concerning the validity of zoning ordinances generally, there is disagreement as to whether such ordinances invalidate restrictive covenants when the two are inconsistent.²⁴ The more modern view is that the zoning ordinance will prevail in the case of an inconsistency,²⁵ at least if the zoning ordinance forbids the use specified in the restrictive covenant.²⁶ If, of course, a zoning ordinance can constitutionally invalidate a restrictive covenant, there is absolutely no reason why a statute cannot empower an administrative body to proceed directly against restrictive covenants as did the statute in the instant case. It is apparent therefore that, while the court in *Pulos* had ample authority for its position, it again took a property-oriented approach in the face of developing authority in the opposite direction.

In *Continental Enterprises, Inc. v. Cain*²⁷ and *Selvia v. Reitmeyer*,²⁸ plaintiffs unsuccessfully sought to establish easements by

²²*Downs v. Kroeger*, 200 Cal. 743, 254 P. 1101 (1927). See also *Bachman v. Colpaert Realty Corp.*, 101 Ind. App. 306, 194 N.E. 783 (1935).

²³See, e.g., *Lutz v. New Albany City Plan Comm'n*, 230 Ind. 74, 101 N.E.2d 187 (1951).

²⁴Most cases have held that the covenant prevails. See, e.g., *Murphey v. Gray*, 84 Ariz. 299, 327 P.2d 751 (1958); *Capp v. Lindenberg*, 242 Ind. 423, 178 N.E.2d 736 (1962); *Whiting v. Seavey*, 159 Me. 61, 188 A.2d 276 (1963). *Contra*, *City of Richlawn v. McMakin*, 313 Ky. 265, 230 S.W.2d 902 (1950).

²⁵8 McQUILLAN, MUNICIPAL CORPORATIONS § 25.09 (1965); Comment, *The Effect of Private Restrictive Covenants on Exercise of the Public Powers of Zoning and Eminent Domain*, 1963 WIS. L. REV. 321.

²⁶*Grubel v. MacLaughlin*, 286 F. Supp. 24 (D.V.I. 1968); *City of Richlawn v. McMakin*, 313 Ky. 265, 230 S.W.2d 902 (1950). This is the position of the RESTATEMENT OF PROPERTY § 568 (1944).

²⁷296 N.E.2d 170 (Ind. 1973).

²⁸295 N.E.2d 869 (Ind. 1973).

way of necessity across the lands of others. In both cases the absence of any previous unity of ownership was quite correctly held to bar the implication of an easement by way of necessity. In neither case does the opinion reveal how the tracts became landlocked. However, a common cause of inaccessible land in recent years has been the construction of interstate highways and lakes and the reopening of rural lands which have been unused for many years with the result that access roads have been abandoned. The two cases emphasize that, in many situations, Indiana law affords no remedy to landlocked property owners.²⁹ In situations in which the lack of access resulted from a conveyance subdividing a larger accessible tract in such a way that the part conveyed or retained was cut off from an access road, an easement can be implied in the conveyance which created the problem.³⁰ Easements by way of necessity are implied easements. There must be a conveyance into which such an easement can be inserted by way of implication. Easements do not arise simply as a result of a public policy requiring that all land be accessible, although that may be one of the reasons for the doctrine of implied easements by way of necessity.³¹ Such easements are created by a grant in which it is assumed that the parties intended to create an easement giving access to land which would otherwise be inaccessible. The statements by the courts in both *Cain* and *Selvia* that there must have been a previous common ownership become relevant in this context. When, however, the inaccessibility is created by the construction of a limited access highway, or by the closing and abandonment of a road, no remedy is available to owners of landlocked property, even though there may have been a previous common ownership.

Our legal system should not tolerate a situation in which land may be rendered useless due to lack of access. Society as a whole suffers from such economic waste, and this is true even though the owner of such property may have been fully compensated by a condemnation award at the time his land was rendered inaccessible. It may be true that courts can offer no relief in this situation, but legislatures can. Many states have enacted statutes giving the landlocked property owner the right of eminent domain in this situa-

²⁹Indiana has had a statute for many years providing a right of eminent domain to a landowner whose property has become landlocked because of the "straightening of any stream or the construction of any ditch." IND. CODE § 32-5-3-1 (Burns Supp. 1974). In 1973, this was amended to add "or the erection of any dam constructed by the State of Indiana or the United States."

³⁰*Conover v. Cade*, 184 Ind. 604, 112 N.E. 7 (1916).

³¹*See Moore v. Indiana & Michigan Elec. Co.*, 229 Ind. 309, 95 N.E.2d 210 (1950).

tion.³² A similar statute is needed in Indiana. The right should be available to the landlocked property owner without regard for the conditions under which his land was rendered inaccessible.

XII. Secured Transactions and Creditors' Rights

*R. Bruce Townsend**

The last year has seen some sensational developments in the law of secured transactions and creditors' rights. The vendor under a conditional sales contract is now recognized as holding a security interest in land like that of a mortgagee. The exemptions of a wage earner have been expanded by the Indiana Supreme Court but narrowed by the highest Court of the land. The Indiana courts have also dealt with many technical and policy questions which should be of interest to the legal profession.

A. Real Estate Recording Statutes and Priorities

The Indiana recording statutes are incomplete, inconsistent, and leave much to be desired, especially with respect to reserved interests and transfers not literally or fully covered by recording laws.¹ An example of one problem will illustrate this observation. Suppose that *V* contracts to sell land to *P* on a conditional sales contract. Later, a third party, *P2*, acquires an interest from *V*.

³²An example of such legislation is 10 TENN. CODE ANNO. § 54-1902 (1956) which provides:

Any person owning any lands, ingress or egress to and from which is cut off or obstructed entirely from a public road or highway by the intervening lands of another, or who has no adequate and convenient outlet from said lands to a public road in the state, by reason of the intervening lands of another, is given the right to have an easement or right-of-way condemned and set aside for the benefit of such lands over and across such intervening lands or property.

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¹Indiana has two general statutes governing priorities. One relates to reserved interests. IND. CODE § 32-1-2-17 (Burns 1973). The other applies to conveyances, mortgages and leases. *Id.* § 32-1-2-16. Other statutes provide for recordation of certain types of instruments without including rules of priorities. *E.g.*, *id.* § 32-1-2-32. *Cf. id.* §§ 30-4-4-1, -2 (Burns 1972). None of the statutes states a clear or satisfactory rule for determining priorities, but IND. R. TR. P. 63.1(A), providing for the effect of lis pendens notice filing or lack of it, is satisfactory in that area.

Who prevails, and what law governs the rights of the parties?² Prior to the enactment of the modern recording statutes, *P1* was regarded as holding an equitable title. Such title could be cut off by a bona fide purchaser of a legal title from *V* but, as between competing equities, the rule was first in time, first in right.³ The time is ripe for a definitive court decision establishing priority rights among different classes of owners in real estate and, hopefully, the courts will read all the recording statutes as part of an integrated whole and apply uniform rules to both equitable and legal interests in land.⁴ The court of appeals passed up this opportunity in *Rural Acceptance Corp. v. Pierce*,⁵ in which a judgment creditor of the vendor claimed that his judgment lien took precedence over the interest of the vendor's prior purchaser, who was in possession of the land. The judgment creditor argued that his lien gave him a prior right to proceeds realized from insurance carried by the purchaser for himself and the vendor covering the loss of a building.⁶ The purchaser was given priority upon the theory that a judgment lienholder is not a purchaser for value who will cut off prior "equities." Unfortunately, the court failed to examine the valuable but sometimes ignored rule that a purchaser's possession gives him a perfected title as against the claims of subsequent parties.⁷

²The cases on this problem are almost indecipherable. Compare *Bandy v. Myers*, 141 Ind. App. 220, 227 N.E.2d 183 (1967), with *Denham v. Degymas*, 237 Ind. 666, 147 N.E.2d 214 (1958). Neither case considered the recording statutes which apply to land contracts. *Case v. Bumstead*, 24 Ind. 429 (1865); IND. CODE § 32-1-2-32 (Burns 1973).

³Compare *Denham v. Degymas*, 237 Ind. 666, 147 N.E.2d 214 (1958), with *Combs v. Nelson*, 91 Ind. 123 (1883), and *Wright v. Shepherd*, 47 Ind. 176 (1874).

⁴Some past decisions dealing with the Indiana recording laws have gone far toward achieving this result. Thus, defeasible equitable titles which depend upon parol proof are subject to the recording laws which literally apply only to separate written defeasances. *Tuttle v. Churchman*, 74 Ind. 311 (1881). A statute protecting purchasers for value has been judicially rewritten to apply to purchasers giving value without notice. *Wilson v. Wilson*, 86 Ind. 472 (1882). Plat books have been brought within the recording laws without express statutory provision. *Miller v. Indianapolis*, 123 Ind. 196, 24 N.E. 228 (1890).

⁵298 N.E.2d 499 (Ind. Ct. App. 1973).

⁶The court upheld an order granting specific performance to the purchaser and directing that the price first be applied to the vendor's mortgagee. Any excess was to go to the alleged judgment lienholders in the order of what the court assumed to be their judgment liens upon the land. Under the doctrine of equitable conversion, recognized by the court, the vendor had no interest in land but only in personal property. See discussion at text accompanying notes 119-29 *infra*.

⁷A decision to this effect would eliminate for all time the "lazy banker" rule of *Mishawaka, St. Joseph Loan & Trust Co. v. Neu*, 209 Ind. 433,

B. Conditional Sales Contracts

For centuries, the English law and most state statutes have prohibited forfeiture of the rights of a mortgagor. Indiana law contemplates that the mortgagee by contract or otherwise cannot defeat the mortgagor's right of redemption until sale, which sale may not be held until six months after the filing of the foreclosure complaint.⁸ For centuries, crafty lawyers have sought ways to defeat this redemption right, and one device for achieving this end has been the conditional sales contract. It has been the traditional view in Indiana that a conditional vendor of real estate could declare a forfeiture upon the vendee's default when the contract allowed him to do so.⁹ The Indiana Supreme Court declined to approve this practice in the case of *Skendzel v. Marshall*,¹⁰ in which the court required a vendor, who had received over one-half of the purchase price, to foreclose his interest or lien by following the same procedure applicable to mortgagees. The decision was immediately followed by the Indiana Court of Appeals in *Tidd v. Stauffer*.¹¹ Although *Skendzel* indicated that forfeiture would be permitted in situations in which it was equitable to do so, the case is a landmark which brings a much needed humanity and consistency to the law.¹² This need for humanity and consistency was flaunted, but clearly demonstrated, in *Goff v. Graham*.¹³ The

196 N.E. 85, 105 A.L.R. 881 (1935). In that case, the interest of a vendee with three days possession was defeated by a banker who took a mortgage without actual knowledge. Case law overwhelmingly protects the purchaser in possession, who arguably holds a legal title. Cf. *Burt v. Bowles*, 69 Ind. 1 (1879) (equitable title of possessor protected by legal remedy of ejectment).

⁸The Indiana mortgage statute gives a right of redemption and prohibits sales of real estate before the elapse of six months after the filing of the foreclosure complaint. IND. CODE § 32-8-16-1 (Burns 1973) (mortgages executed after July 1, 1957). This requirement was applied to all lien foreclosures by IND. R. TR. P. 69(C). This right of the mortgagor may not be contracted away. *Federal Land Bank v. Schleeter*, 208 Ind. 9, 194 N.E. 628 (1935).

⁹*E.g.*, *J.F. Cantwell Co. v. Harrison*, 95 Ind. App. 293, 180 N.E. 482 (1932).

¹⁰301 N.E.2d 641 (Ind. 1973).

¹¹308 N.E.2d 415 (Ind. Ct. App. 1974) (when \$16,000 had been paid on the purchase price of \$39,000, the court ordered foreclosure rather than forfeiture).

¹²The old law made a distinction between the rights of a conditional seller and a mortgagee of personal property. This inconsistency was one of the emphatic reasons for Article 9 of the Uniform Commercial Code which eliminated any artificial differences and treated the conditional sales contract as an ordinary security interest. UNIFORM COMMERCIAL CODE § 9-201 (37).

¹³306 N.E.2d 758 (Ind. Ct. App. 1974).

court of appeals upheld a lower court decision, after the lower court had exercised apparently unprecedented continuing jurisdiction over the parties to a conditional sales contract in default, and allowed the vendor to claim a forfeiture of moneys paid along with damages which included overdue back payments.¹⁴

One other problem related to the *Skendzel* case should be noted. When the bankers succeeded in bringing about the adoption of the new Trust Code, a means for evading redemption rights may have seeped into the law through a provision which allows an owner of land to convert the land into personal property by a kind of legal “hocus pocus”—a form of dry trust.¹⁵ Thus, an owner may convey his land to a trustee but preserve the right of management in himself as beneficiary, his interest thereby becoming personal property. The idea seems to have come from Illinois, where several recent decisions hold that the beneficiary, who is the real owner of the land for most practical purposes, may give a security interest in his rights as personal property.¹⁶ This security interest may be foreclosed under the Uniform Com-

¹⁴The history of the case in the court below indicated that the defendant was reordered to comply with the contract. This action was followed by appointment of a receiver, dismissal of the receiver, and finally a judgment of cancellation with damages. The opinion in the court of appeals upheld damages for waste and allowed the balance of the award to stand as an award of restitution based upon moneys received by the purchaser as rent. However, no deductions for expenses incurred by the purchaser were mentioned. *See* *Grissom v. Moran*, 292 N.E.2d 627 (1973), *modifying* 290 N.E.2d 119 (Ind. Ct. App. 1972), in which the court held that in a rescission action the burden of proof falls upon the defendant to adjust the equities or damages to achieve the status quo. Two other recent decisions, involving identical fact situations, considered alleged abuses by a conditional seller of real estate and his alleged conspirators in which a form of strict forfeiture apparently was allowed. *Ernst v. Schmal*, 308 N.E.2d 732 (Ind. Ct. App. 1974); *Lake Mortgage Co. v. Federal Nat'l Mortgage Ass'n*, 308 N.E.2d 739 (Ind. Ct. App. 1974). The court in *Ernst* avoided careful examination of the vendee's claims by upholding a lower court decision granting a new trial to the conditional seller and finding insufficient evidence of wrongdoing by a receiver and a prior mortgagee who allegedly participated in the vendee's abuses.

¹⁵IND. CODE § 30-4-2-14 (Burns 1972). This section permits a power of sale in the trustee upon the direction of the beneficiary or other person, thus allowing a lender-trustee to sell the beneficiary's interest on foreclosure. *Id.* § 30-4-2-13 upholds the trust when the beneficiary has the power to manage the real property and excludes the trust from the usual treatment given to a dry trust.

¹⁶*Wambach v. Randall*, 484 F.2d 572 (7th Cir. 1973) (beneficiary's interest under land trust is personal property and security interest therein may be perfected by filing under the Uniform Commercial Code).

mercial Code¹⁷ without judicial sale and without the right of redemption under statutes applicable to mortgages on real estate.¹⁸ It is unlikely that the court which decided *Skendzel* would allow the land trust provision of the Trust Code to repeal the mortgage redemption laws.¹⁹

A vendor improperly evicting a purchaser under a conditional sales contract undoubtedly commits a material breach of contract, thus allowing the purchaser to treat the contract as terminated and to rescind.²⁰ This remedy was clearly recognized by the supreme court in *Smeekens v. Bertrand*,²¹ wherein the breach occurred when the vendor posted bond and improperly recovered possession at the threshold of an ejectment action. Thereupon, the purchaser elected to rescind and sought recovery upon the ejectment bond. The court of appeals²² held that the bond did not cover this element of damages, thus allowing a somewhat shocking abuse of the summary procedures then available in ejectment. Some of the sting of this decision has been removed by the new Indiana ejectment statute,²³ enacted to meet the objections which the United States Supreme Court pronounced in *Fuentes v. Shevin*.²⁴ The

¹⁷IND. CODE §§ 26-1-1-101 to -2-4-1 (IND. ANN. STAT. §§ 19-1-101 to -14-116, Burns 1964) [hereinafter cited as UNIFORM COMMERCIAL CODE; hereinafter referred to as the UCC or Code].

¹⁸Kortenhof v. Messick, 309 N.E.2d 368 (Ill. App. 1974) (holding that mortgage foreclosure act did not apply to beneficiary of trust who assigned his interest as security to a bank).

¹⁹It is extremely doubtful that the land trust provision of the Indiana statute will be held to transform the beneficiaries' interest into personal property for purposes of foreclosure. First, Indiana courts have always taken a dim view of sham transactions to defeat foreclosure laws. *E.g.*, Kerfoot v. Kessner, 227 Ind. 58, 84 N.E.2d 190 (1949); Knapp v. Ellyson Realty Co., 211 Ind. 180, 5 N.E.2d 973 (1937); Davis v. Landis, 114 Ind. App. 665, 53 N.E.2d 544 (1944). Secondly, repeal of the statute by the vague language of the Trust Code is almost unthinkable. Thirdly, the Trust Code specifically provides that the "rules of law contained in this article do not apply to . . . security instruments and creditor arrangements." IND. CODE § 30-4-1-1(c) (Burns 1972).

²⁰Compare Gwynne v. Ramsey, 92 Ind. 414 (1883), with Jennings v. Bond, 14 Ind. App. 282, 42 N.E. 957 (1895). *But cf.* Haas v. Rathburn, 137 Ind. App. 172, 205 N.E.2d 329 (1965) (holding that tenant in ejectment action could not set up eviction in counterclaim).

²¹311 N.E.2d 431 (Ind. 1974).

²²Bertrand v. Smeekens, 298 N.E.2d 25 (Ind. Ct. App. 1973).

²³IND. CODE §§ 32-6-1.5-1 *et seq.* (Burns Supp. 1974). This statute requires notice and hearing before possession is awarded to the plaintiff upon his showing of a "reasonable probability" of recovery in the principal action. *Id.* § 32-6-1.5-5. In case of emergency, possession may be granted without hearing upon affidavits filed with the court. *Id.* § 32-6-1.5-3.

²⁴407 U.S. 67 (1972). This case held unconstitutional statutes which allowed replevin to a plaintiff posting bond but which had no provision

statute provides for a preliminary hearing on the question of the plaintiff's probability of recovery. In any event, the court of appeals decision seems unsound, particularly insofar as the surety bondsman is protected by his right of subrogation which includes the right to the returned property.

C. Motor Vehicles

In Indiana, a security interest in a motor vehicle is created by an ordinary security agreement which must be in writing, must be signed by the debtor, and must describe the collateral. In addition, value must be given and the debtor must have rights in the collateral.²⁵ Suppose that there is no formal security agreement, but that the lien is indicated upon the application for the certificate of title and upon the certificate of title issued by the Bureau of Motor Vehicles. Two formalities required for a security agreement may be missing. One is the lack of the debtor's signature, since he is not required to apply for the certificate,²⁶ and the other is the omission of words of grant or promise.²⁷ In *White v. Household Finance Corp.*,²⁸ the court held that, although the certificate named the secured party as lienholder and included the debtor's surety as a co-owner with the debtor, it did not fulfill the requirements of a security agreement as specified by the Uniform Commercial Code because the signature of the debtor was lacking.²⁹ *White* poses an

for notice and hearing. *Fuentes* has since been modified by *Mitchell v. W.T. Grant Co.*, 94 S. Ct. 1895 (1974) (allowing ejectment when the judge authorizes possession to a plaintiff who furnishes evidence and a bond).

²⁵UNIFORM COMMERCIAL CODE §§ 9-203(1)(b), 9-204(1). To be perfected as against creditors, purchasers and other secured parties claiming through the debtor, the security interest must be indicated upon the certificate of title by a public official. *Id.* § 9-302(3) & (4). However, perfection is not required to create a security interest between the debtor and the secured party.

²⁶*Id.* §§ 9-203(1)(b), 9-204(1). When a certificate of title or of origin is transferred, the assignment upon the certificate is executed and signed by the seller, and not by the transferee who is usually the debtor.

²⁷It is for this reason, i.e., that the financing statement does not contain words of promise or grant, that an official financing statement signed by the debtor does not meet the requirements of a security agreement. *E.g.*, *American Card Co. v. H.H.M.H. Co.*, 97 R.I. 59, 196 A.2d 150 (1963).

²⁸302 N.E.2d 828 (Ind. Ct. App. 1973). This case held that, when the secured party released insurance moneys to permit the debtor to acquire the motor vehicle in question, a release of collateral was effectuated which discharged the surety upon the debtor's obligation.

²⁹Substantial authority was cited in support of this result. *E.g.*, *Shelton v. Erwin*, 472 F.2d 1118 (8th Cir. 1973). Other authority to the contrary was also cited. Recently, it has been held that, if a number of documents or instruments are prepared as part of a sale, loan and security transaction, all the papers must be read together as one writing. *In re Penn Housing Corp.*, 367 F. Supp. 661 (W.D. Pa. 1973).

extremely important problem which often arises as a result of common business practice. Often the seller of a motor vehicle delivers possession to the buyer and, to assure payment, the seller retains possession of the certificate of title in his name, without the formality of a security agreement.³⁰ The *White* case indicates the risk involved in this practice and suggests the need for use of at least an informal security agreement when delivery is made before payment is received.

D. After-acquired Collateral and Proceeds

A security agreement may cover after-acquired collateral,³¹ and it may also apply to proceeds or property taken in exchange

³⁰It is not uncommon for a seller of a motor vehicle who receives a check for the price to withhold the certificate of title and his assignment thereon by fastening it to the buyer's check. When the check is paid by the drawee, the certificate with the assignment is made available to the buyer when he receives his cancelled check. But, if the check is not paid, the certificate will be returned to the seller. In this case, the pre-Uniform Commercial Code cases usually held that an unpaid seller could repossess the vehicle even against a bona fide purchaser from the buyer who was not a dealer and who did not get the certificate of title. *E.g.*, *Nelson v. Fisch*, 241 Iowa 1, 39 N.W.2d 594 (1949). *But cf.* *Fryer v. Downard*, 134 Ind. App. 225, 187 N.E.2d 105 (1963) (buyer apparently forged seller's signature to certificate entrusted to buyer; buyer also appeared to be a dealer). Under the Uniform Commercial Code, the seller who receives a bad check for the price of goods delivered to the buyer has a right to reclaim the goods, but the buyer holds a voidable title with a power to cut off the seller's title by sale to a bona fide purchaser. UNIFORM COMMERCIAL CODE § 2-403(1). The seller's right in such a case is a right of rescission and restitution, and is not a security interest. *Compare id.* §§ 2-511(3) (payment by check conditional), 2-702 (seller allowed to reclaim goods when buyer received goods on credit while insolvent), 2-721 (preserving remedies for fraud and extending relief available in case of rescission), *with* *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 519 P.2d 354, 359, 14 UCC REP. SERV. 40, 47 (Colo. 1974) ("the right to reclaim goods sold in a cash sale transaction . . . is not and was not intended to be a security interest"). The better authority under the Code, however, will protect the seller who has received a bad check from the buyer and who retains the certificate of title as against the purchaser of the buyer, if the buyer is not a dealer, upon the theory that the purchaser taking the vehicle without a certificate of title does not purchase in good faith. *Morris Plan Co. v. Moody*, 266 Cal. App. 2d 28, 72 Cal. Rptr. 123, 5 UCC REP. SERV. 1026 (1968); *Mattek v. Malofsky*, 42 Wis. 2d 16, 165 N.W.2d 406, 6 UCC REP. SERV. 277 (1969). *Cf.* *Lane v. Honeycutt*, 14 N.C. App. 436, 188 S.E.2d 604, 10 UCC REP. SERV. 1173 (1972) (purchaser from buyer who gave bad check did not receive certificate of title to boat).

³¹UNIFORM COMMERCIAL CODE § 9-204(3) & (4). A financing statement may be filed prior to the execution of a security agreement and before the debtor acquires any rights in the collateral and, as a general rule, a secured

for the original security.³² Both of these rules were involved in *White v. Household Finance Corp.*,³³ in which the original security agreement on the debtor's motor vehicle included language covering after-acquired household and consumer goods.³⁴ When the motor vehicle was destroyed in an accident, the court recognized the generally accepted rule that insurance covering the debtor against loss of collateral is not proceeds. Such insurance may be claimed as security only when the debtor agrees to insure or when the secured party is named in the policy as an insured.³⁵ The debtor voluntarily had caused the secured party to be named with him as an insured, so that the insurance continued as security after the loss. However, the secured party and the debtor indorsed the insurance check to a dealer for a new motor vehicle without executing a new security agreement covering the second vehicle. The court held that the new vehicle was not covered by the first security agreement, either as proceeds of the insurance moneys³⁶ or as after-acquired collat-

party's rights date from the time of perfection. Compare *id.* § 9-402(1) with *id.* § 9-312(3) & (5).

³²A security interest continues in identifiable proceeds which include whatever is received when collateral or proceeds are sold, exchanged, collected or otherwise disposed of. See *id.* § 9-306(1) & (2). Perfection as to proceeds is accomplished by indication in the financing statement covering the original collateral; otherwise perfection is required as to the proceeds with a ten day grace period if the original collateral was perfected. *Id.* § 9-306(3).

³³302 N.E.2d 828 (Ind. Ct. App. 1973).

³⁴Although not discussed in the case, descriptions such as "consumer" or "household" goods have been held sufficient. *In re Turnage*, 493 F.2d 505 (5th Cir. 1974); *In re Trumble*, 5 UCC REP. SERV. 543 (W.D. Mich. 1968); *United States v. Antenna Systems, Inc.*, 251 F. Supp. 1013 (D.N.H. 1966). *Contra, In re Lehner*, 303 F. Supp. 317, 6 UCC REP. SERV. 1023 (D. Colo. 1969). A general description is almost a necessity in the case of after-acquired collateral. *Barnett Bank v. Fletcher*, 290 So. 2d 533 (Fla. App. 1974). A motor vehicle would seem to be "consumer goods" within the general Code definition of the term if used or bought primarily for personal, family, or household purposes. UNIFORM COMMERCIAL CODE § 9-109(1).

³⁵When insurance is carried by the lien-debtor only, the secured party has no rights to loss payments unless the former agreed to insure the property. *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535, 13 N.E. 683 (1887). When the debtor procures an insurance policy naming himself and the secured party as insureds, the latter may enforce the policy as a creditor beneficiary and any recovery inures to the benefit of a surety upon the obligation. *Cf. Cook v. American States Ins. Co.*, 275 N.E.2d 832 (Ind. Ct. App. 1971). If the policy names both the debtor and secured parties as insureds, the latter receives added protection when a "union" or "standard" clause is used, thereby treating each as separately insured. *Federal Nat'l Mortgage Ass'n v. Great Am. Ins. Co.*, 300 N.E.2d 117 (Ind. Ct. App. 1973) (allowing mortgagee to recover loss after it had purchased the insured property on foreclosure of mortgage).

³⁶The court correctly held that insurance moneys are not "proceeds" of the original collateral—a position supported by the weight of Code and

eral. Section 9-204(4) of the Uniform Commercial Code provides that no security interest attaches under an after-acquired property clause with respect to consumer goods given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value. The court held that this restriction was applicable to the facts in this case and overlooked the fact that the secured party's indorsement and delivery of the check constituted a contemporaneous exchange for the new automobile and, therefore, was value given within the ten day period.³⁷ Furthermore, it appeared that the second vehicle was claimed not as "additional" but as replacement security.³⁸ Upon this point, it seems that the court was in error, and the exchange of the check for the contemporaneous acquisition of the new vehicle should

pre-Code law. *E.g.*, *Universal C.I.T. Credit Corp. v. Prudential Inv. Corp.*, 101 R.I. 287, 222 A.2d 571, 3 UCC REP. SERV. 696 (1966). This was the pre-Code rule in Indiana. *Hoverstock v. Darrow*, 94 Ind. App. 83, 179 N.E. 790 (1932). The proposed revision to the UCC would provide that insurance covering loss of collateral is proceeds. UNIFORM COMMERCIAL CODE § 9-306(1) (1972 version). The main question in *White* was whether the second motor vehicle purchased with the insurance funds was proceeds. Since the right under the insurance policy was properly excluded from the ambit of the UCC, *id.* § 9-104(g), the question of whether the second vehicle took the place of the secured party's rights to the insurance fund was governed by common law principles or the UCC's requirement that a security agreement describing the collateral be signed by the debtor. *Id.* §§ 9-203(1)(b), 9-204(1). The court then held that, in the absence of a written security agreement signed by the debtor, no security interest attached to the new vehicle. In other words, substitution of collateral which is not proceeds must be effectuated by a security agreement meeting UCC requirements. This matter is discussed at text accompanying notes 73-76 *infra*.

³⁷When the secured party indorsed the check payable to him and to the debtor, and the check was used by the debtor to purchase the new vehicle, surrender of the proceeds constituted value. UNIFORM COMMERCIAL CODE § 9-108. This is a form of "new value" and constitutes a well recognized concept of securities law. *See Phelps v. National Acceptance Co. of America*, 7 UCC REP. SERV. 56 (M.D. Ala. 1969).

³⁸The limitation upon after-acquired collateral in the case of consumer goods is restricted to cases in which the security is taken as "additional" security. UNIFORM COMMERCIAL CODE § 9-204(4)(b). Seemingly, this does not apply when collateral is substitutional. Security agreements commonly extend to items taken in replacement of the collateral, and this appears to be the reason for limiting the prohibition as to after-acquired collateral in consumer goods to "additional" security. Section 9-204(4)(b) also excludes accessions from the exception. The reason for requiring the debtor to acquire rights in the goods within ten days after the secured party gives value is to prevent the lender, who takes a security interest in after-acquired consumer goods, from reaping the benefit of such a pot-luck provision without in any way contributing to later acquisitions by the debtor. *Cf. In re Johnson*, 13 UCC REP. SERV. 953 (D. Neb. 1973).

properly have brought the new vehicle within the after-acquired property clause contained in the first agreement.

The Code also restricts after-acquired property provisions in the case of crops by requiring that a security agreement cannot cover future crops unless they become growing within one year of the execution of the security agreement.³⁹ The Court of Appeals for the Seventh Circuit, in *United States v. Gleaners & Farmers Cooperative Elevator Co.*,⁴⁰ upheld a financing arrangement encompassing future crops when the successive security agreements applied to crops which became growing within the year of each security agreement, even though those crops were not growing within one year after the filing of a single financing statement. The court held that the financing statement was still effective for the usual five years.⁴¹ Unfortunately, the court disapproved the one year rule by reference to proposed Uniform Commercial Code amendments which would allow farmers to encumber their crops in perpetuity.⁴² The need to finance the planting, care, and harvest of current crops is a life and death matter, and thus there are sound policy reasons for keeping current crops available as security for current loans. The one year rule is a good one and elimination of it should only be accomplished after careful thought.⁴³

E. Inventory and Accounts Receivable Financing

Probably the most significant pioneering provisions of the Code relate to inventory and accounts receivable financing.⁴⁴ Several recent decisions in this area are of importance to bankers and others involved in this type of financing. The Code adopts the basic

³⁹UNIFORM COMMERCIAL CODE § 9-204(4) (a). This one year restriction does not extend to security interests in crops given in conjunction with a lease, land purchase or land improvement transaction evidenced by a contract, mortgage or deed of trust.

⁴⁰481 F.2d 104 (7th Cir. 1973).

⁴¹A financing statement is effective as constructive notice for five years from the date of filing unless it contains a maturity date within that period, in which case it becomes ineffective sixty days after the maturity date. UNIFORM COMMERCIAL CODE § 9-403(2). The Code fixes no expiration date on the effectiveness of a security agreement except as applied to after-acquired property clauses in the case of consumer goods and crops. *See id.* § 9-204(4).

⁴²*Id.* § 9-204(3) (1972 amendment proposed by the National Conference of Commissioners on Uniform State Laws and the American Law Institute).

⁴³The Code gives a super-priority, to enable production during the growing season, to a security interest taken for new value not more than three months before crops become growing, but only as against prior security interests due more than six months before the crops become growing. *Id.* § 9-312(2).

⁴⁴No longer is it a fraud on creditors for a secured party to take a security interest in inventory and accounts receivable without requiring a strict accounting as to the proceeds. *Id.* § 9-205.

rule that if *D* gives a security interest upon his inventory to *SP*, who perfects, a subsequent buyer in the ordinary course of business will take free of the prior security interest even though he knows of its existence.⁴⁵ The rule was applied in *First National Bank v. Crone*,⁴⁶ in which a dealer in logs had executed a security interest in 147 logs to secure a \$15,000 obligation to his bank, which then "recorded"⁴⁷ a financing statement covering the transaction. Thereafter, the logs were sold to or through a partnership engaged in the business of buying and selling logs. The partnership, in turn, arranged for a sale to an ultimate buyer who paid for the logs by means of a draft deposited with the bank. The bank then withheld the proceeds when the draft was collected. The court held that the partnership was a buyer in the ordinary course of business and took priority as to the draft proceeds less the net amount it owed to the dealer on the price of the logs.

The *Crone* case resolved two interesting questions. First, the court held that a sale of the dealer's entire stock of logs did not constitute a bulk sale, excluded by definition, when the dealer had been engaged in the business of buying and selling logs for over twenty-five years. The burden of proving that the sale was in bulk or out of the ordinary course of business evidently was placed on the inventory financier.⁴⁸ A second question arose when it appeared

⁴⁵*Id.* § 9-307. This substantially restates prior law. *Helms v. American Security Co.*, 216 Ind. 1, 22 N.E.2d 822 (1939).

⁴⁶301 N.E.2d 378 (Ind. Ct. App. 1973).

⁴⁷A distinction of no importance is that financing statements are filed, not recorded. The court assumed that the bank's security interest in the inventory was duly perfected. Had it not been perfected, any buyer, including a buyer in bulk, would have been protected under UNIFORM COMMERCIAL CODE § 9-301(1)(c) had he acquired delivery and given value without knowledge of the prior security interest.

⁴⁸The court held that the absence of evidence showing that the dealer, who sold to the alleged buyer in the ordinary course of business, intended to abscond or repurchase under a sham agreement showed that the sale was in the ordinary course of business. Compare *Everett Nat'l Bank v. Deschuteneer*, 109 N.H. 112, 244 A.2d 196, 5 UCC REP. SERV. 561 (1968). However, proof of an intent to defraud creditors is not required in the case of a bulk sale and, in fact, most bulk sales, when there is compliance with Article 6 of the Uniform Commercial Code, are carried out without fraudulent purposes on the part of either the buyer or seller. Probably the real effect of the *Crone* case is that a sale in the ordinary course of business includes a sale to a broker or wholesaler in the goods. *E.g.*, *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648, 10 UCC REP. SERV. 523 (Del. 1972) (merchant-buyer may be a buyer in the ordinary course of business and the Article 2 definition of good faith as applied to merchants is inapplicable to an Article 9 transaction); *Associates Discount Corp. v. Rattan Chevrolet, Inc.*, 462 S.W.2d 546, 8 UCC REP. SERV. 117 (Tex. 1970). At the least, the case stands for the proposition that a seller regularly engaged in selling raw products, which

that the alleged buyer in the ordinary course of business had advanced \$6,300 on the price before delivery of the goods. The definition of a buyer in the ordinary course of business includes "receiving goods . . . under a pre-existing contract for sale, but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt."⁴⁹ Without discussion, it was determined that the receipt of goods in satisfaction of a prior down payment on their price is a receipt "under a pre-existing contract for sale" and not a transfer in "total or partial satisfaction of a money debt." This is a most sensible conclusion.⁵⁰

The Court of Appeals for the Seventh Circuit, in *Fitzpatrick v. Philco Finance Corp.*,⁵¹ dealt with one of the important problems involved in inventory and accounts receivable financing, that is, when cash proceeds are commingled or deposited in a general bank account and the debtor is subjected to bankruptcy. Section 9-306 (4) (d) of the Uniform Commercial Code provides generally that a perfected security interest in cash proceeds intermingled or deposited in a bank account continues to be perfected into the whole of the cash or bank account in the event insolvency proceedings are instituted against the debtor. However, the perfected security interest in the bank account or commingled cash is limited to cash proceeds

require further processing by the buyer, sells in the ordinary course of business when he sells large quantities of his inventory to other merchants or processors.

⁴⁹UNIFORM COMMERCIAL CODE § 1-201(9).

⁵⁰If the seller is indebted to the buyer on a prior debt which is applied to reduce the purchase price of the goods, the buyer is not a buyer in the ordinary course of business. *Sherman v. Roger Kresge, Inc.*, 323 N.Y.S.2d 804, 9 UCC REP. SERV. 858 (Broome County Ct. 1971) (seller delivered used cars—inventory—in exchange for buyer's check which was returned to buyer and applied on prior debt owing by seller to buyer); *Chrysler Credit Corp. v. Malone*, 502 S.W.2d 910, 13 UCC REP. SERV. 964 (Tex. Civ. App. 1973) (seller sold automobile to buyer who purchased by returning a \$5,000 check given earlier on the same day by seller to buyer for a prior obligation owing for insurance premiums). It is interesting to note that, in the *Crone* case, the buyer gave value before receiving possession of the goods. Some decisions have held that a buyer in the ordinary course of business, who makes payment under a valid contract to purchase, qualifies even if he does not receive delivery of the goods. *E.g.*, *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648, 10 UCC REP. SERV. 523 (Del. 1972); *Draper v. Minneapolis-Moline, Inc.*, 100 Ill. App. 2d 324, 241 N.E.2d 342, 5 UCC REP. SERV. 972 (1968); *Chrysler Credit Corp. v. Sharp*, 288 N.Y.S.2d 525, 5 UCC REP. SERV. 226 (Sup. Ct. 1968). *Contra*, *Chrysler Credit Corp. v. Adamatic, Inc.*, 59 Wis. 2d 219, 208 N.W.2d 97, 12 UCC REP. SERV. 849 (1973) (holding that when some goods are returned to the debtor for repair, buyer qualifies as buyer in the ordinary course of business).

⁵¹491 F.2d 1288 (7th Cir. 1974). The case involved the Illinois version of the Uniform Commercial Code which is the same as Indiana's version.

received and commingled or deposited within ten days prior to the institution of the proceedings less cash proceeds received by the debtor and paid over to the secured party during the ten day period.⁵²

In *Fitzpatrick*, an inventory financier with a perfected security interest in inventory and proceeds was paid some \$44,000 from the debtor's general checking account during the ten day period prior to bankruptcy. The court held that, since the security interest in the bank account ceased to be perfected ten days prior to the institution of the bankruptcy proceeding, payments from the account within that period to the secured party depleted the debtor's estate by transferring his property to pay an antecedent debt which was not fully secured. Therefore the transfer was vulnerable as a preference.⁵³ The court also held that the date of payment by check from the account was the date the instrument was paid by the drawee bank, not the date the check was received.⁵⁴ The secured party was allowed to retain \$4,500 of the payment which represented cash proceeds from inventory received by the debtor within the ten day period and deposited in the debtor's general account, even though the court erroneously indicated that such allowance was questionable as a priority provision in conflict with the Bankruptcy Act.⁵⁵

The decision emphasizes the need for the use of special bank accounts for the deposit of cash proceeds and the danger of accept-

⁵²This rule, providing a practical but limited right of tracing cash proceeds upon insolvency, was derived from section 10(b) of the Uniform Trust Receipts Act, ch. 206, § 10(b), [1935] Ind. Acts 1003 (repealed 1964), which was in effect in Indiana until the adoption of the Uniform Commercial Code. It has been held that cash proceeds received and paid to the secured party, which are required to be subtracted from those received and intermingled or deposited, refers to cash proceeds paid from intermingled or deposited funds. *In re Security Aluminum Co.*, 9 UCC REP. SERV. 47 (E.D. Mich. 1971).

⁵³The amounts in the bank account apparently were proceeds or other funds received and deposited in the account prior to bankruptcy. Literally, UNIFORM COMMERCIAL CODE § 9-306(4)(d)(ii) provides that the security interest in the whole of the account is perfected "in the event of insolvency" proceedings but is limited by cash proceeds received within the ten day period and deposited in the account, less pay outs therefrom to the secured party within the same period. It should be noted that, if the secured party claimed unpaid proceeds in the bank account received by the bankrupt prior to the ten day period, as an unperfected security interest, the claim would have been awarded under *id.* § 9-301(1)(b) & (3) and Bankruptcy Act § 70c, 11 U.S.C. § 110(c) (1970).

⁵⁴*Accord*, UNIFORM COMMERCIAL CODE § 3-409 (a draft or check is not an assignment).

⁵⁵11 U.S.C. § 96 (1970). The history of this problem and its correct solution is discussed in Henson, "Proceeds" under the Uniform Commercial Code, 65 COLUM. L. REV. 232 (1965) (reprinted in 2 UCC REP. SERV. 566).

ing payments from the general bank account of the debtor whenever bankruptcy is imminent.⁵⁶ The courts will face an even more difficult problem when a case arises in which payments are received from a general bank account or intermingled cash proceeds prior to the ten day period.⁵⁷ Literally, section 9-306(4)(d) deals only with transactions occurring within the ten day period. Therefore, payments made to a secured party before that time should be protected as payments from cash proceeds subject to the accepted rules for tracing proceeds commingled with other cash funds or in a bank account.⁵⁸

⁵⁶Identifiable cash proceeds which are not commingled continue to be perfected. UNIFORM COMMERCIAL CODE § 9-306(4)(a) to (c). If moneys constituting proceeds are deposited in a special account and are, thus, segregated, perfection continues into the account. *Salzer v. Victor Lynn Corp.*, 315 A.2d 185, 14 UCC REP. SERV. 208 (N.H. 1974).

⁵⁷Payments from intermingled cash proceeds or a general bank account made prior to the ten day period are not specifically dealt with by the Code. It would seem, therefore, that a secured party may claim that such payments are realized from perfected collateral and are nonpreferential to the extent permitted under common law rules of tracing. Indiana follows the lowest intermediate fund theory, *i.e.*, if proceeds are traced to a bank account, the debtor is presumed to make subsequent withdrawals from other funds first so that the secured party may reach the balance not exceeding the lowest amount of the fund after the deposit of his item. *E.g.*, *Rottger v. First Merchants Nat'l Bank*, 98 Ind. App. 139, 184 N.E. 267 (1933). When several secured parties trace proceeds to an intermingled mass or deposit, they share pro-rata subject to the lowest intermediate fund rule. *See Gibbs v. Gerberick*, 1 Ohio App. 2d 93, 96, 203 N.E.2d 851, 855-56 (1964), quoting RESTATEMENT OF RESTITUTION § 213(c) (1937). If cash proceeds are transferred to bona fide purchasers for value, the latter will take priority over perfected security interests. *Merchants Nat'l Bank & Trust Co. v. United States*, 12 UCC REP. SERV. 902 (U.S. Ct. Cl. 1973) (United States, receiving proceeds from checking account in payment of taxes, took priority over secured party). However, a banker's right of set-off to proceeds deposited in a bank account is generally deferred to security interests in proceeds deposited in the account. *Universal C.I.T. Credit Corp. v. Farmers Bank*, 358 F. Supp. 317, 13 UCC REP. SERV. 109 (E.D. Mo. 1973); *Commercial Discount Corp. v. Milwaukee Western Bank*, 61 Wis. 2d 671, 214 N.W.2d 33, 12 UCC REP. SERV. 1202 (1974). *Cf. Peoples State Bank v. Caterpillar Tractor Co.*, 213 Ind. 235, 12 N.E.2d 123 (1938).

⁵⁸If the secured party is able to trace his payment to proceeds in a bank account, there is generally no preference simply because his perfected security interest in the proceeds is used to pay the debtor's indebtedness. If the transfer of the security interest in the original collateral was perfected more than four months prior to bankruptcy, or obtained in exchange for a contemporaneous loan, there will be no preference. Likewise, when a fully secured creditor is paid from any source, there is no preference because the transaction results merely in an exchange or release of the debtor's property and there is no depletion of his estate to the injury of general creditors. In the

The supreme court qualified the holding of the court of appeals in *Ertel v. Radio Corp. of America*,⁵⁹ which recognized that an assignee of accounts takes free of independent defenses and claims accruing to the account debtor after the account debtor has received notification to pay the assignee.⁶⁰ On transfer, the supreme court found that the rights under three contracts between the debtor and the account debtor were assigned, but that the set-off or counterclaim arose out of the debtor's defective performance under the third contract. The court held that the claim or defense was one arising out of that contract and, as required by section 9-318(1)(a) of the Uniform Commercial Code, the assignee took subject to the claim without regard to the time of notification.⁶¹ The court did not indicate whether the right of set-off was limited to the amount of the claim on the third contract or whether it would be allowed on the other two contracts assigned.

In *First National Bank v. Smoker*,⁶² the court denied a farmer, who sold cattle on credit to a meat processor, the right to reclaim the cattle as against a prior security interest in the buyer's inventory. The reason for denial of the farmer-seller's right to reclaim was that he failed to comply with section 2-702 of the Uniform Commercial Code, which requires a demand within ten days after delivery. This holding was reinforced by the United States Supreme Court in *Mahon v. Stowers*,⁶³ wherein the Court determined that the farmer was not protected under provisions of the Federal Packers and Stockyards Act.⁶⁴

F. Assignments by Lienholder or Lien Debtor

Several decisions dealt with assignments of rights by lienholders. In *Ertel v. Radio Corp. of America*,⁶⁵ the court recognized the general rule that a surety who pays a creditor in full is subro-

Fitzpatrick case, the secured party's claim was not fully secured, so that payment from unperfected funds was vulnerable as a preference.

⁵⁹307 N.E.2d 471 (Ind. 1974).

⁶⁰The case also affirmed the court of appeals opinion, holding that a surety who paid the assignee secured party was subrogated to the assignee's rights to the collateral, *i.e.*, the claim against the account debtor, and that proper notification to the account debtor was received as required by UNIFORM COMMERCIAL CODE § 9-318(3).

⁶¹"... the rights of an assignee are subject to (a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom..." *Id.* § 9-318(1)(a).

⁶²286 N.E.2d 203 (Ind. Ct. App. 1972).

⁶³94 S. Ct. 1626 (1974).

⁶⁴7 U.S.C. §§ 181 *et seq.* (1970).

⁶⁵307 N.E.2d 471 (Ind. 1974). The creditor brought this action against the debtor and guarantors for the amount owing under a loan and security agreement covering accounts receivable and revolving inventory.

gated to all the rights the creditor has in the collateral, including rights against an account debtor upon an account held as security.⁶⁶ The general rule that a lien debtor may not escape liability by assigning his rights and duties to another without the consent of the creditor was recognized in *Chrysler Corp. v. M. Present Co.*,⁶⁷ which involved an assignment of a leasehold interest.⁶⁸

Two recent decisions, *Ernst v. Schmal*⁶⁹ and *Lake Mortgage Co. v. Federal National Mortgage Association*,⁷⁰ dealt with the difficulties encountered by a purchaser of land under a conditional sales contract when the land was sold subject to a prior mortgage. Those cases failed to clarify the issues arising when a purchaser is in default upon the contract and the vendor's subsequent grantee is in default upon the mortgage. Litigation involved an attempt to hold the vendor and others liable for interfering with the purchaser's relationship with the mortgagee.⁷¹

G. Release and Discharge of Surety

The rule that a surety is discharged to the extent of the creditor's release or impairment of collateral is a common law proposition and is also codified in section 3-606 of the Uniform Commercial Code. This principle was recognized and applied in *White v. Household Finance Corp.*,⁷² wherein the court acknowledged the

⁶⁶The surety's right of subrogation to any collateral held by the creditor was recognized in *White v. Household Finance Corp.*, 302 N.E.2d 828 (Ind. Ct. App. 1973), in which an uncle was the surety upon a promissory note of his nephew. The note was secured by a security interest in a motor vehicle. The court held that the surety's right of subrogation extended to other collateral acquired by the creditor, even when the surety released the lien on the motor vehicle after it had been wrecked.

⁶⁷491 F.2d 320 (7th Cir. 1974). This case was a consolidated action brought by the plaintiff to recover damages for loss of property in a warehouse fire.

⁶⁸The court cited *Navin v. New Colonial Hotel*, 228 Ind. 128, 90 N.E.2d 128 (1950), for this well established proposition.

⁶⁹308 N.E.2d 732 (Ind. Ct. App. 1974) (upholding the trial court's right to grant a new trial because the jury was confused as to the complex issues).

⁷⁰308 N.E.2d 739 (Ind. Ct. App. 1974) (purchaser's action, for conspiracy to evict purchaser, brought against vendor's grantee-mortgagee and receiver in foreclosure proceeding; action dismissed as to mortgagee).

⁷¹The problem in both cases seemingly involved a tort claim against the vendor's grantee for bringing about foreclosure of a prior mortgage. The judges at both the appellate and trial levels seemed as confused about the theory of the case as the jury. The purchaser's assertions may have some merit. See *Monarch Buick Co. v. Kennedy*, 138 Ind. App. 1, 209 N.E.2d 922 (1965), in which the assignor of a security agreement was held liable in conversion when he induced the assignee to repossess the collateral.

⁷²302 N.E.2d 828 (Ind. Ct. App. 1973). The case is discussed in connection with the creation and perfection of security interests in motor vehicles at note 66 *supra*. See also text accompanying notes 28-37 *supra*.

rule that a contemporaneous substitution of collateral of equal value does not release a surety.⁷³ However, the court found that the creditor had failed to procure a security interest in property which it had permitted the debtor to acquire with insurance moneys held as security for the loan on which the surety was held discharged.⁷⁴ Prior Indiana law had established that a creditor is under no duty to record or perfect a security interest in collateral received from the principal,⁷⁵ but the court in *White* indicated that the duty imposed by the Uniform Commercial Code—to use reasonable care with respect to collateral in the creditor's possession—would include a duty to perfect.⁷⁶ Outright surrender, to the debtor-principal, of collateral perfected by possession was held to constitute an impairment of collateral which discharged the surety on the obligation.

A lien debtor in default may defeat foreclosure by redeeming, that is, by tendering the full amount owing under the security transaction. The court in *Lake Mortgage Co. v. Federal National Mortgage Association*⁷⁷ recognized and applied the generally accepted rule that a valid tender must include the full amount due.

H. Remedies and Other Rights of Parties to Secured Transactions

Secured parties generally insist on insurance protection, and four recent decisions emphasized the importance of such protection. In *Federal National Mortgage Association v. Great American Insurance Co.*,⁷⁸ a casualty policy covering the debtor, with a pro-

⁷³*Hunter v. Community Loan & Inv. Corp.*, 127 Ga. App. 142, 193 S.E.2d 55 (1972).

⁷⁴In this case, the moneys released by the secured party apparently equaled the unpaid balance of the loan.

⁷⁵*Philbrooks v. McEwen*, 29 Ind. 347 (1868).

⁷⁶"A secured party must use reasonable care in the custody and preservation of collateral in his possession. . . ." UNIFORM COMMERCIAL CODE § 9-207(1). The court cited two recent decisions holding that a surety is discharged when the creditor fails to perfect the security interest and the surety is defeated by other claimants as a consequence. *First Bank & Trust Co. v. Post*, 10 Ill. App. 3d 127, 293 N.E.2d 907, 12 UCC REP. SERV. 512 (1973); *Shaffer v. Davidson*, 445 P.2d 13, 5 UCC REP. SERV. 772 (Wyo. 1968). In the *White* case, the creditor failed to obtain a security interest in the new collateral, but no third party rights were involved.

⁷⁷308 N.E.2d 739 (Ind. Ct. App. 1974). In this case, the conditional purchaser, who was three months in arrears, tendered the installment due for one month and tender was refused. Foreclosure upon debtor's default was therefore held proper.

⁷⁸300 N.E.2d 117, 118 (Ind. Ct. App. 1973). The clause in question stated that insurance "shall not be invalidated by any act or neglect of the mortgagor

vision including the mortgagee under the “union” or “standard” clause was held to cover the mortgagee even after he had purchased the insured property at a mortgage foreclosure sale. The “union” or “standard” clause is especially desirable because it, in effect, is two separate policies, one for the debtor and one for the lienholder, so that the non-performance of conditions, or the breach, or the termination of the relationship by one party will not defeat a recovery of insurance proceeds by the other. In another case, *White v. Household Finance Co.*,⁷⁹ the court held that naming a secured party in an insurance policy voluntarily acquired by the debtor protects the secured party. This is true even though the proceeds of insurance would not otherwise be covered by a security agreement which did not require the debtor to insure. However, a secured party cannot be forced to pay insurance premiums on policies procured by the debtor, which name the secured party as an insured, in the absence of express, implied or apparent authority. In *Kody Engineering Co. v. Fox & Fox Insurance Agency*,⁸⁰ the court of appeals affirmed this rule and held that no recovery could be had on a theory of unjust enrichment, at least in the absence of reimbursement under the policy for a loss. Finally, in *Goff v. Graham*,⁸¹ the failure of a debtor to procure insurance, as required by his agreement, was held to be a material breach which justified the conditional vendor’s declaration of a default.

Although a secured party may normally recover a deficiency when repossessed collateral is sold pursuant to the requirements of the Uniform Commercial Code,⁸² the right may be waived. In *Yellow Manufacturing Acceptance Corp. v. Voss*,⁸³ the court held that

or owner of the within described property, nor by any foreclosure.” For a further discussion of the virtue of the “union” or “standard” clause, see Comment, *The Effect of the Standard Mortgage Clause in Insurance Policies*, 12 IND. L.J. 50 (1936). *Accord*, *Aetna Ins. Co. v. Robinson*, 213 Ind. 44, 10 N.E.2d 601 (1937) (vendor repossessed under conditional sales contract).

⁷⁹302 N.E.2d 828 (Ind. Ct. App. 1973). See discussion at note 66 and text accompanying notes 28-37 *supra*.

⁸⁰303 N.E.2d 307 (Ind. Ct. App. 1973) (holding that no ratification by the secured party could be found from statements made by the secured party while he was uninformed that he was covered by the insurance policy).

⁸¹306 N.E.2d 758 (Ind. Ct. App. 1974). For a further discussion of this case, see text accompanying notes 14-15 *supra*.

⁸²UNIFORM COMMERCIAL CODE § 9-504. However, the Uniform Consumer Credit Code limits a secured party, in the case of a consumer credit sale of goods or services, to repossession of the collateral or recovery upon the debt, but only when the cash price of the sale is \$1,200 or less. See IND. CODE § 24-4.5-5-103 (Burns 1974).

⁸³303 N.E.2d 281, 283 (Ind. Ct. App. 1973). The decision of the lower court was affirmed upon the debtor’s testimony that an agent had told him he “would have no more trouble” after he surrendered the truck.

the secured party's office manager, who had authority to repossess collateral, had apparent authority to accept a return of the property in exchange for the surrender of rights to a deficiency. It is interesting to note that the oral release of deficiency rights was given without consideration. In *Traylor v. Lafayette National Bank*,⁸⁴ the court allowed an action on a note to be joined with foreclosure of stock certificates pledged as security. The court reluctantly admitted parol evidence to show the holder's breach of a joint venture agreement to supply additional capital to the borrower.

The Indiana statute on foreclosure of tax liens contains no provision for giving notice of the sale to mortgagees. The court of appeals, in *Shigley v. Whitlock*,⁸⁵ refused to determine the constitutionality of that statute because the record failed to show that the mortgagee, who challenged the statute, was without actual notice of the sale and therefore prejudiced by the alleged defect in the law.⁸⁶

I. Mechanics' Liens

A subcontractor, laborer or materialman furnishing materials or services to the prime contractor may assert a mechanics' lien either upon the property or upon unpaid funds. Such a lien is measured by the reasonable market value of the materials or services and is not to exceed the full contract price. The lien must be recorded within sixty days and foreclosed within a year of recordation or within thirty days after notice to the lienholder to bring suit.⁸⁷

Is there any other theory upon which the owner may be held? In *Renn v. Davidson's Southport Lumber Co.*,⁸⁸ the lower court

⁸⁴303 N.E.2d 672 (Ind. Ct. App. 1973). In discussing the parol evidence rule, the court did not mention UNIFORM COMMERCIAL CODE § 3-119, which clearly allows a contemporaneous written agreement to vary the terms of a negotiable instrument as between the immediate parties.

⁸⁵310 N.E.2d 93 (Ind. Ct. App. 1974). The statute in question was IND. CODE § 6-1-56-3 (Burns 1972). The court held that, although the burden of proof was upon the purchaser at a tax sale to establish that notice was given to the mortgagee, since the record on appeal did not show that the mortgagee was without actual notice, the decision of the lower court against the mortgagee should be affirmed. It seems that the court placed the burden of proving lack of actual notice upon the mortgagee.

⁸⁶Prior case law holds that notice to the mortgagee is unnecessary. *Cf. Baldwin v. Maroney*, 173 Ind. 574, 91 N.E. 3 (1910). However, this was prior to the now famous case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

⁸⁷The Indiana mechanics' lien laws are codified at IND. CODE §§ 32-8-3-1 *et seq.* (Burns 1973).

⁸⁸300 N.E.2d 682 (Ind. Ct. App. 1973). The case is one that every lawyer involved with summary judgments should carefully study. It teaches that

granted summary judgment to a subcontractor upon the theory that the prime contractor had been authorized to procure materials from the subcontractor, thereby making the owner liable as a direct contracting party with the subcontractor. The decision was reversed because the contract upon which agency was based was not in the record and because affidavits did not establish that the agency relationship was unrevoked. However, the case raises a red flag to owners who should carefully examine their contracts with prime contractors to make certain that such contractors are not granted agency authority.

In *Saint Joseph's College v. Morrison, Inc.*,⁸⁹ a subcontractor claimed two mechanics' liens, one based upon his contract with the prime contractor and the other based upon a separate contract with the owner for "extras." The court held that recordation of one lien met the notice requirements of the mechanics' lien law as to both liens since both liens arose out of one construction project.⁹⁰ However, the two liens could not be tacked for purposes of computing the sixty day period in which the liens must be recorded, that is, the single notice was effective only as to those contracts upon which work or labor was performed within the sixty day period.⁹¹ The court also explained that it is only when the contractor or subcontractor recovers judgment enforcing a mechanics' lien that he is allowed reasonable attorneys' fees. If he recovers only upon the contract with the owner, attorneys' fees cannot generally be recovered.⁹² In another opinion, *Oxford Development Corp. v. Rausauer*

documents should be carefully put before the court and their foundations established by affidavits. Affidavits must set forth facts based upon the personal knowledge of an affiant, who has been affirmatively shown to be competent to testify, and they must be otherwise admissible as evidence.

⁸⁹302 N.E.2d 865 (Ind. Ct. App. 1973).

⁹⁰Judge Buchanan's opinion on this point was solidly based on the idea that the mechanics' lien, in Indiana, is a consensual lien, that is, it must arise out of contract with the owner or with his assent. Hence, there is no real reason why one lien notice on two separate contracts should not be sufficient so long as the parties are named and the land is identified.

⁹¹On the other hand, the time for recording mechanics' liens may be extended when the owner requests repairs to be made. In this case, the time starts running from the time of the last work. *E.g.*, *Conlee v. Clark*, 14 Ind. App. 205, 42 N.E. 762 (1896) (the time commenced from the time the hot water line was removed by the subcontractor at the request of the new owner). A contractor or subcontractor cannot extend the time by voluntarily making repairs. *Ellis v. Auch*, 124 Ind. App. 454, 118 N.E.2d 809 (1954).

⁹²Although reasonable attorneys' fees are allowed to the plaintiff recovering judgment in the enforcement of a mechanics' lien, an owner cannot be held for attorneys' fees when the "contract consideration for such labor, material or machinery has been paid" by him or the party for whom the improvement has been constructed. IND. CODE § 32-8-3-14 (Burns 1973). This

Builders, Inc.,⁹³ the court recognized that extra work comes within the terms of a written contract expressly providing for "extras"⁹⁴ and upheld an award of \$5,400 attorneys' fees in favor of the prime and subcontractors. The award was upheld even though the contractors had asked for only \$1,500 in their complaint. The court reasoned that, for purposes of appeal, the complaint was deemed to be amended to fit the proof adduced at the trial.

Interpretation of the types of contracts and relationships covered by the Indiana mechanics' lien law will probably never end because the statute applies both to enumerated types of work and to "other structures," thus inviting application of the *ejusdem generis* rule of statutory construction. The court in *Hough v. Zehrner*⁹⁵ rejected the rule, however, and applied the lien law in favor of a materialman who furnished crushed stone for a driveway to be used in conjunction with a commercial garage being constructed.

J. Wage Garnishment Exemptions

Prior to the adoption of the Uniform Consumer Credit Code⁹⁶ in Indiana, it was quite clear that 90% of a debtor's wages were exempt from garnishment in proceedings supplemental.⁹⁷ In the case of a resident householder, \$15 per week plus 90% of his weekly wages above that amount were exempt when the judgment was founded upon contract.⁹⁸ Although there was some question about the constitutionality of these statutes, which granted a much lower initial exemption than in the case of real or personal property,⁹⁹ the figures were widely accepted as governing law. Then, on

seems to mean that, if the owner pays the prime contractor for work completed by the subcontractor, the subcontractor cannot recover attorneys' fees when he forecloses against the property.

⁹³304 N.E.2d 211 (Ind. Ct. App. 1973).

⁹⁴Failure to pay for the extras was held to be a material breach which justified the contractor in his refusal to go forward with performance. For purposes of recording and tacking, a duty to pay under a written contract and for "extras" would therefore seem to be one contract. Compare *Saint Joseph's College v. Morrison, Inc.*, 302 N.E.2d 865 (Ind. Ct. App. 1973), considered at text accompanying notes 88-91 *supra*.

⁹⁵302 N.E.2d 881 (Ind. Ct. App. 1973).

⁹⁶IND. CODE §§ 24-4.5-1-101 to -6-203 ((Burns 1974) [hereinafter referred to as UCCC]).

⁹⁷*Id.* § 34-1-44-7 (Burns 1973).

⁹⁸*Id.* § 34-2-28-1(d). This provision is included in the general exemption statute.

⁹⁹In *Martin v. Loula*, 208 Ind. 346, 194 N.E. 178 (1935), the court held that a statute allowing 90% of intangibles to be exempt while other property, up to \$1,000, could be claimed as fully exempt denied equal protection to debtors owning intangibles. If this result is followed to its logical conclusion, the present exemption laws are all unconstitutional.

October 1, 1971, the Uniform Consumer Credit Code, which gave additional benefits to judgment debtors by a prohibition against discharge for garnishment of wages,¹⁰⁰ provided that 25% of a judgment debtor's weekly disposable earnings above 30 times minimum hourly wages "shall be subject to garnishment . . . notwithstanding any exemption or other law."¹⁰¹ The Indiana Supreme Court, in *Mims v. Commercial Credit Corp.*,¹⁰² applied "Alice in Wonderland" reasoning to hold that the law did not mean what it said. The court allowed the judgment debtor to take the highest exemption allowed under either the UCCC or the prior law. Based upon present minimum wage laws of \$2 per hour for employees covered by the Fair Labor Standards Act¹⁰³ prior to February 1, 1967, the opinion directs that the exemption available to a resident householder with respect to judgments founded upon contract will be \$15 plus 90% of weekly disposable earnings above \$15, if weekly disposable earnings are greater than \$90. However, if weekly disposable earnings are less than \$90, the exemption is computed at 30 times minimum hourly wages, now 30 times \$2, plus 75% of weekly disposable earnings above that amount (\$60) as provided by the UCCC.¹⁰⁴ If the debtor is not entitled to the \$15 weekly exemption, his exemption will be computed at 90% of total weekly disposable earnings if the weekly disposable earnings are greater than \$100; but, if weekly disposable earnings are less than \$100, the exemption is 30 times hourly minimum wages, now 30 times \$2, plus 75% of weekly disposable earnings above that amount (\$60) as provided by the UCCC.¹⁰⁵

¹⁰⁰IND. CODE § 24-4.5-5-106 (Burns 1974).

¹⁰¹*Id.* § 24-4.5-5-105. The law excludes and thus makes exempt amounts required by law to be withheld from earnings.

¹⁰²307 N.E.2d 867 (Ind. 1974).

¹⁰³29 U.S.C. §§ 201-09 (1970).

¹⁰⁴The point at which the old formula *with* the \$15 householder exemption grants a larger exemption than that permitted by the UCCC is determined by the following equation (X being the point at which each formula produces the same exemption and the minimum hourly wage being \$2): $.10 (X - \$15) = .25 (X - \$60)$; $X = \$90$. Thus, if weekly disposable earnings are \$90, then either formula will produce the maximum exemption. If weekly disposable earnings are less than \$90, then the old formula will produce the maximum exemption. If weekly disposable earnings are greater than \$90, then the UCCC formula will produce the maximum exemption.

¹⁰⁵The point at which the old formula *without* the \$15 householder exemption grants a larger exemption than that permitted by the UCCC is determined by the following equation (X being the point at which each formula produces the same exemption and the minimum hourly wage being \$2): $.10X = .25 (X - \$60)$; $X = \$100$. Thus, if weekly disposable earnings are \$100, then either formula will produce the maximum exemption. If weekly disposable earnings are less than \$100, then the old formula will

Three unfortunate results flow from the *Mims* decision. The first concerns the many hundreds of outstanding garnishment orders based upon the UCCC computation. What happens to those judgments or decrees? They may be reopened under Trial Rule 60(B)¹⁰⁶ but, until this is done, the finality of such judgments cannot be challenged. The second unfortunate result flows from the unusual affirmative burden placed upon the court to determine the debtor's exemption when he is not represented by counsel, a burden which seemingly will be applied to all exemptions in the case of proceedings supplemental. However, since the Federal Truth in Lending Act¹⁰⁷ fixes a somewhat similar but smaller exemption, language in that law seems to deny jurisdictional power to any court to award less than the exemption allowed by the federal law.¹⁰⁸

produce the maximum exemption. If weekly disposable earnings are greater than \$100, then the UCCC formula will produce the maximum exemption.

¹⁰⁶It sometimes is believed that a continuing decree or injunction cannot be later modified except as provided by statute, on appeal or by other recognized post-judgment remedies. This, however, is untrue as applied to courts of equity who have continuing jurisdiction to modify a continuing decree or order which becomes oppressive due to changed conditions. *E.g.*, *United States v. Swift & Co.*, 286 U.S. 106 (1932); *cf.* *Union Trust Co. v. Curtis*, 182 Ind. 61, 105 N.E. 562 (1914); *Crumpacker v. Howes*, 140 Ind. App. 37, 222 N.E.2d 296 (1966). Recent Indiana decisions make it clear that the open-end provisions of IND. R. TR. P. 60(B)(7) & (8) will be liberally construed to permit modification of a continuing order or decree when enforcement becomes inequitable. *E.g.*, *Soft Water Util., Inc. v. LeFevre*, 301 N.E.2d 745 (Ind. 1973) (the court amended the date of a ruling to conform to the misinformation supplied by the court's clerk); *School City v. Continental Elec. Co.*, 301 N.E.2d 803 (Ind. Ct. App. 1973) (a decree of specific performance was set aside in favor of the party obtaining it when performance became impossible). *But cf.* *Public Serv. Comm'n v. Schaller*, 299 N.E.2d 625 (Ind. Ct. App. 1973) (the court unnecessarily equated relief under IND. R. TR. P. 60(B)(8) with the inherent power of the court to modify an equitable decree and limited the corrective action to changed conditions which were not foreseeable).

¹⁰⁷15 U.S.C. §§ 1672, 1673 (1970). The Truth in Lending Act provides that the maximum amount of the aggregate disposable earnings subject to garnishment may not exceed the lesser of 25% of the judgment debtor's disposable earnings for that week, or the amount by which the judgment debtor's disposable earnings exceed 30 times minimum hourly wages. In short, this means that the judgment debtor is allowed an exemption of \$60 (at the present minimum hourly wage of \$2) with respect to weekly wages up to \$90. When his wages exceed \$90 a week, he is entitled to an exemption measured by 25% of weekly wages. In computing weekly wages, withholdings required to be made by law are excluded and thus made exempt.

¹⁰⁸The Act provides that "[n]o court of the United States or any State may make, execute, or enforce any order or process in violation of this section." *Id.* § 1673(c). A similar provision will be found in section 5-105(3) of the UCCC. IND. CODE § 24-4.5-5-105(3) (Burns 1974). These provisions were not mentioned in the *Mims* case.

A third consequence of the holding in the *Mims* case is that it not only complicates the computation of exemptions, but fixes them at such low rates that the effect may be to dry up credit to the very poor, a result at war with the underpinnings of the UCCC. The case demonstrates the need for an overhaul of Indiana's many exemption laws¹⁰⁹ and forthrightly mandates a humane approach to the whole problem.

In a recent decision, the United States Supreme Court dealt with the interesting question of whether a debtor's right to a refund of income taxes withheld from wages is subject to creditor process. In *Kokoszka v. Belford*,¹¹⁰ the bankrupt defended a turnover order directing him to deliver his refund check to the trustee. The bankrupt claimed that the refund was exempt under the Federal Truth in Lending Act, which exempts from garnishment the lesser of 25% of a debtor's disposable weekly earnings or 30 times minimum wage. Chief Justice Burger limited the exemption to "garnishment" of periodic payments and did not extend the exemption to include the trustee's rights to reach proceeds of weekly payments

¹⁰⁹The general exemption statute, IND. CODE § 34-2-28-1 (Burns 1973), is limited to debtors who are resident householders and to judgments founded upon contract. Many other statutes exempt such items as specified pensions and insurance but are not restricted to resident householders and to judgments founded upon contract. The garnishment statute, *id.* § 34-1-44-7, allows only 10% of the debtor's income or profits to be subjected to garnishment in proceedings supplemental. The 90% exemption thus allowed is not limited to resident householders or to judgments founded upon contract. Under the garnishment statute, it has been held that enforcement of an alimony or support decree by garnishment is limited to 10% of the judgment debtor's income. *Clay v. Hamilton*, 116 Ind. App. 214, 63 N.E.2d 207 (1945) (the court disallowed the \$15 exemption since the judgment was not founded upon contract). Hence, although the UCCC allows garnishment of wages and income in excess of the exemption provided therein, the more liberal provisions allowing 90% of earnings and income to be exempt under the garnishment law would seem to prevail under the ruling of the *Mims* decision. Compare IND. CODE § 24-4.4-5-106(2) (Burns 1974) with *id.* § 34-1-44-7 (Burns 1973). It appears, however, that the court may award alimony or support payments in excess of that prescribed by exemption laws. *Cf. Dorman v. Dorman*, 251 Ind. 272, 241 N.E.2d 50 (1968) (court ordered payment of \$40 a week support to be made from the husband's pay of \$75 a week). But, in view of *Wellington v. Wellington*, 304 N.E.2d 347 (Ind. Ct. App. 1973), holding that alimony decrees for the payment of money are no longer enforceable by contempt, collection of such decrees from income and wages must occur under garnishment laws in proceedings supplemental, resulting in the right of the judgment defendant to assert that 90% of his income or wages is exempt.

¹¹⁰94 S. Ct. 2431 (1974). The decision did not flatter the many judges in the lower federal courts who had written extensive opinions on the same subject. None of their opinions were cited.

once they have been made.¹¹¹ In view of the more humane attitude of the Indiana Supreme Court toward exemptions,¹¹² and because the Indiana definition of "garnishment" is much broader than the federal law's definition and includes proceedings requiring the debtor to withhold earnings,¹¹³ it is not unlikely that tax refunds from wage withholdings will be held exempt under the Indiana Uniform Consumer Credit Code. Therefore, such tax refunds should also be held exempt in Indiana bankruptcy proceedings.¹¹⁴

K. *Property Subject to Creditor Process*

Not all the debtor's interests in property are subject to creditor process. Indiana law recognizes that a creditor cannot reach a future interest in property "incapable of being appraised or sold with fairness to both the debtor and the creditor."¹¹⁵ A substantial extension of this doctrine occurred in *Loeb v. Loeb*,¹¹⁶ wherein the supreme court held that, in an award of alimony, the court could not consider the husband's interest in a trust established by his mother which was to be paid to him upon his mother's death, subject to the condition that he survive her. The decision is to be applauded in the expectation that it will help remove all speculative future interests from court sponsored market places. In a somewhat similar vein, the court of appeals, in *Irwin Union Bank & Trust Co. v. Long*,¹¹⁷ held that a wife with a judgment for alimony

¹¹¹The Court first determined that the tax refund for the tax year 1971 was "property" of the debtor at the time he filed his petition on January 5, 1972. The Court did not determine what the answer would have been had the petition been filed in 1971. Chief Justice Burger accepted the idea that a "tax refund is not the weekly or other periodic income required by a wage earner for his basic support." *Id.* at 2435. He did not take judicial notice of inflation nor of the well known fact that millions of families depend upon their tax refunds for support.

¹¹²See *Mims v. Commercial Credit Corp.*, 307 N.E.2d 867 (Ind. 1974). See text accompanying notes 102-109 *supra*.

¹¹³The Federal Truth in Lending Act defines "garnishment" as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." 15 U.S.C. § 1672(c) (1970). The Indiana law defines "garnishment" as

any legal or equitable proceedings through which the earnings of an individual are required to be withheld by a garnishee, by the individual debtor, or by any other person for the payment of a judgment.

IND. CODE § 24-4.5-5-105(1)(b) (Burns 1974).

¹¹⁴Not only are exemptions provided by federal law allowed to a bankrupt, but the bankrupt can also take advantage of the exemptions allowed under state law. Bankruptcy Act § 6, 11 U.S.C. § 24 (1970).

¹¹⁵*Gushwa v. Gushwa*, 93 Ind. App. 68, 75, 177 N.E. 366, 368 (1931).

¹¹⁶301 N.E.2d 349 (Ind. 1973).

¹¹⁷312 N.E.2d 908 (Ind. Ct. App. 1974).

could not force the judgment debtor to exercise his right to withdraw up to four per cent of the principal of a trust of which he was beneficiary, when the trust instrument provided that none of his creditors could reach the trust corpus.¹¹⁸

L. Judgment Liens and Lien Creditors

A creditor with a judgment may obtain a lien upon the judgment debtor's real estate by causing the judgment to be entered and indexed in the judgment docket in the county where the land is located.¹¹⁹ Although this lien will protect the judgment lienholder against persons who subsequently acquire an interest in the property from the judgment debtor,¹²⁰ the judgment lienholder is not a purchaser for value who may claim the rights of a bona fide purchaser as against prior unperfected interests in the land. This rule was applied in *Rural Acceptance Corp. v. Pierce*.¹²¹ On the other hand, a creditor who obtains a lien on personal property by means of judicial proceedings will take priority over prior unperfected security interests, if the lien creditor becomes such without knowledge.¹²² The *Pierce* court ignored an interesting problem generated by its unusual facts. *V* gave a mortgage to *E1* upon which a balance was owing. *V* then contracted to sell the land to *P2* who went into possession owing a balance to *V* in excess of the mortgage. *C3* then obtained a judgment against *V* and he apparently claimed a judgment lien upon the land. *C4* thereafter obtained a

¹¹⁸In reaching this result, the court emphasized that it would attempt to give effect to the intention of the settlor and, in so doing, considered the federal estate tax law and the obvious efforts of the settlor to provide for his grandchildren. Prior case law indicated that a beneficiary's interest in a spendthrift trust could be reached for purposes of paying alimony or support to the beneficiary's wife or children. *Cf. Clay v. Hamilton*, 116 Ind. App. 214, 63 N.E.2d 207 (1945) (allowing a wife holding an alimony judgment to reach the husband's interest in the trust for support). The judgment debtor in *Long* was not the settlor. Had he been the settlor, IND. CODE § 30-1-9-14 (Burns 1972) would have had some relevancy. It provides that a "grantor of lands reserving an absolute power of revocation, shall be deemed an absolute owner, as regards creditors and purchasers."

¹¹⁹IND. CODE §§ 34-1-43-1, -45-2 (Burns 1973).

¹²⁰*E.g., Armstrong v. McLaughlin*, 49 Ind. 370 (1875).

¹²¹298 N.E.2d 499 (Ind. Ct. App. 1973). A judgment creditor who purchases at his own sale is a purchaser for value and qualifies as a bona fide purchaser who will cut off prior unperfected interests. *Pugh v. Highley*, 152 Ind. 252, 53 N.E. 171 (1899). Likewise, an assignee of the judgment lienholder qualifies as a purchaser for value with similar rights. *Tuttle v. Churchman*, 74 Ind. 311 (1881).

¹²²UNIFORM COMMERCIAL CODE § 9-301(1)(b) & (3). A subsequent judgment lienholder on realty who is without knowledge will take priority over a prior unperfected security interest in fixtures. *Id.* § 9-313(3)(c).

judgment against *V*, also apparently claiming a judgment lien upon the land, but he obtained a proceedings supplemental order against *V*, and *P2* as garnishee, directing that amounts owing by *P2* in excess of those owing *E1* who was to be paid first, be paid to *C4*.¹²³ In a subsequent suit by *P2* for specific performance, the lower court ordered payment of the unpaid purchase price to first be applied to *E1*'s mortgage, then to *C3*'s judgment, and finally, if any amounts remained, to *C4*'s judgment. If the payment was insufficient to satisfy either of the judgment creditors, determined by the court to be judgment lienholders, they were to have no further claim. This order was affirmed on the theory that *P2*'s equity was superior to the interest of a subsequent "judgment lienholder."

The astonishing fact is that the judgment debtor, *V*, had no interest in the land. Under the doctrine of equitable conversion, which was recognized by the court, he merely owned *P2*'s obligation to pay him. This obligation was secured by an interest in the land, but was, at most, possibly a contract right or a general intangible.¹²⁴ Since a judgment lien is recognized only in land, it can be argued that neither *C3* nor *C4* obtained a judgment lien upon *V*'s property.¹²⁵ Therefore, when *C4* obtained a garnishment order

¹²³The garnishment order directed the purchaser to make payments directly to *E1* until *E1*'s mortgage was satisfied and then to make the balance of his payments to *C4*. The res judicata effect of this order was not discussed or considered. *But cf.* *Bostwick v. Bryant*, 113 Ind. 448, 16 N.E. 378 (1888). Of course, the order was not binding upon *C3* who apparently was not a party to that proceeding.

¹²⁴*Compare* UNIFORM COMMERCIAL CODE § 9-105(g) with *id.* § 9-106. Although the Uniform Commercial Code does not apply to liens upon real estate, *id.* § 9-104(j), its provisions do govern obligations secured by interests in land. *In re Bristol Associates, Inc.*, 13 UCC REP. SERV. 1150 (E.D. Pa. 1973) (the security taken in a leasehold and rents thereunder was required to be perfected under the provisions of the Uniform Commercial Code); UNIFORM COMMERCIAL CODE § 9-102.

¹²⁵Several very old decisions indicate that a judgment lien may be obtained upon the vendor's interest. *Garr v. Lockridge*, 9 Ind. 92 (1857). On the other hand, the interest of the vendee was not subject to a judgment lien and could be reached only by proceedings supplemental. *Figg v. Snook*, 9 Ind. 202 (1857); *Jeffries v. Sherburn*, 21 Ind. 112 (1863). *But cf.* *Hamilton v. Byram*, 122 Ind. 283, 23 N.E. 795 (1890) (equitable interest of mortgagor under absolute deed subject to execution as interest in land). With the development of the doctrine of equitable conversion, these cases seem unsound. *Jackson v. Snell*, 34 Ind. 241 (1870) (holding that the assignee of promissory notes held by the vendor prevailed over the judgment creditor who claimed a lien upon vendor's interest); *Davis v. Landis*, 114 Ind. App. 665, 53 N.E.2d 544 (1944) (holding the transfer of purchaser's interest in a land contract as security to be a mortgage); *Butcher v. Kagey Lumber Co.*, 164 Ohio 85, 128 N.E.2d 54 (1955) (holding that assignee for value of vendor in an unrecorded executory land contract took priority over a subsequent judgment creditor of the vendor).

against *V*, and *P2* as garnishee, he obtained an equitable lien¹²⁶ prior in time to that of *C3*, who may never have obtained an interest in the property until the lower court issued the order from which *C4* appealed.¹²⁷ In summary, the vendor's interest ought to be treated the same as that of a mortgagee,¹²⁸ and if creditors are to reach it, they must do so by proceedings supplemental.¹²⁹ This, at least, is a logical result which naturally flows from the decision of the Indiana Supreme Court in *Skendzel v. Marshall*.¹³⁰

The Federal Tax Lien Act of 1966 subordinates the federal lien for taxes to "security interests" existing before recordation of the federal lien.¹³¹ By definition, a "security interest" is a security in property which would be given protection against "judgment liens" under state law.¹³² In interpreting this provision, the United States District Court for the Northern District of Indiana, in *Fred Fraus & Sons, Inc. v. United States*,¹³³ gave priority to a properly recorded federal tax lien over a prior unperfected security interest in personal property of the taxpayer, even though the government had been notified of the security interest before its lien arose or was recorded. Under state law, an unperfected security interest is valid against a subsequent lien creditor with knowledge,¹³⁴ but the court held that the federal statute referred to perfection as against all judgment creditors, meaning lien creditors, including those with or without notice.¹³⁵

¹²⁶*Cf.* *Graydon v. Barlow*, 15 Ind. 197 (1860); *Union Bank & Trust Co. v. Vandervoort*, 122 Ind. App. 258, 101 N.E.2d 724 (1951).

¹²⁷*C4* argued, in effect, that he held a perfected security interest in the vendor's real estate because of a filed financing statement. The court dismissed the argument upon the theory that perfection of security interests applies only to personal property other than fixtures. It may have been that *C4* claimed *lis pendens* notice of his lien against *V*'s rights in the contract with *P*, perfection of which is permitted by the filing of a financing statement under IND. R. TR. P. 63.1(A)(2) & (C). The decision does not make this clear.

¹²⁸*Compare, e.g.,* *Walner v. Capron*, 224 Ind. 267, 66 N.E.2d 64 (1946), with *Knapp v. Ellyson Realty Co.*, 211 Ind. 180, 5 N.E.2d 973 (1937).

¹²⁹Choses in action owned by an obligee, as a general rule, cannot be sold on execution against him unless the chose is surrendered by the obligee, *i.e.*, the judgment debtor. *Beckman Supply Co. v. Newell*, 68 Ind. App. 679, 118 N.E. 962 (1918); IND. CODE § 34-1-36-2 (Burns 1973).

¹³⁰301 N.E.2d 641 (Ind. 1973), discussed at text accompanying notes 11-19 *supra*.

¹³¹26 U.S.C. § 6323(a) (1970).

¹³²*Id.* § 6323(h).

¹³³369 F. Supp. 1089, 14 UCC REP. SERV. 828 (N.D. Ind. 1974).

¹³⁴UNIFORM COMMERCIAL CODE § 9-301(1)(b)(3).

¹³⁵The court assumed that the term "judgment lien" is co-extensive with the term "lien creditor" as used in the Uniform Commercial Code. Similar problems will emerge when a state lien for taxes arises and is perfected after the creation of a security interest but before the security interest is

M. *Proceedings Supplemental to Execution*

In Indiana, "actions" upon judgments for the payment of money are barred after ten years,¹³⁶ judgment liens expire within the same period,¹³⁷ execution may issue after ten years from entry of judgment only after notice and hearing,¹³⁸ and judgments of courts of record are "deemed satisfied" after twenty years.¹³⁹ The question presented to the court of appeals in *Myers v. Hoover*¹⁴⁰ was whether proceedings supplemental could be initiated to reach or garnish the debtor's property after ten years had expired from entry of the judgment. The court held that, inasmuch as proceedings supplemental to execution are continued by motion in the original action, the remedy now allowed by Trial Rule 69(E) is not an "action" upon a judgment and therefore is not barred by the ten year statute of limitations. The result finds doubtful support in case law¹⁴¹ and is an unfortunate restriction on statutes of limitations which are usually sufficiently generous to judgment creditors who sleep on their rights. Moreover, the case may mean that orders in proceedings supplemental will not extend the statutes of limitations in favor of judgment creditors.¹⁴² Basically, proceed-

perfected. In this connection, see *Gevyn Constr. Corp. v. Affiliated Eng'rs, Inc.*, 375 F. Supp 207 (W.D. Pa. 1974) (the state lien took priority under the terms of a statute creating a lien for unemployment taxes).

¹³⁶IND. CODE § 34-1-2-2(b) (Burns 1973).

¹³⁷*Id.* § 34-1-45-2.

¹³⁸*Id.* § 34-1-34-2.

¹³⁹*Id.* § 34-1-2-14. This provision has been held to create only a rebuttable presumption of payment. *Pensinger v. Jarecki Mfg. Co.*, 78 Ind. App. 569, 136 N.E. 641 (1922).

¹⁴⁰300 N.E.2d 110 (Ind. Ct. App. 1973).

¹⁴¹*White v. White*, 98 Ind. App. 587, 186 N.E. 349 (1933), held to the contrary at a time when the statute of limitations barring actions upon judgments was twenty years. It is now ten years. See note 136 *supra*. While that case did not involve proceedings supplemental, it did deal with a motion for execution as provided by IND. CODE § 34-1-34-2 (Burns 1973). In support of its decision, the court in *Myers* cited *Hinds v. McNair*, 235 Ind. 34, 129 N.E.2d 553 (1955), in which proceedings supplemental were commenced prior to the end of the ten year period barring a judgment lien and in which the court allowed the proceedings to continue after the ten year period had expired. In quoting from *Hinds*, the court misquoted the effect of that decision which more accurately is stated in the *Hinds* opinion as follows:

We hold, therefore, that the expiration of the judgment lien or the lien of the execution pending the proceedings supplemental does not terminate such proceedings and make them ineffectual.

Id. at 40, 129 N.E.2d at 558.

¹⁴²*But cf.* *Hinds v. McNair*, 235 Ind. 34, 129 N.E.2d 553 (1955). A recent decision has indicated that proceedings supplemental are civil actions subject to the change of venue laws. *McCarthy v. McCarthy*, 297 N.E.2d 441 (Ind.

ings supplemental as provided by statute are equitable in nature.¹⁴³ Hence, judgment creditors pursuing such remedies should be subject to the doctrine of laches, especially since equity usually adopts the outermost limits of the statute of limitations applicable to the underlying legal remedy.¹⁴⁴

N. Bulk Sales—Sale of Business

Suppose that *S* operates a business under the trade name "Rose City Sheet Metal Works" and from time to time purchases supplies from *C*. Later, *S* sells his business, along with the trade name, to *B* who operates thereunder and continues to purchase supplies from *C*. If *B* defaults on his obligations to *C*, may *C* hold *S* upon a theory of estoppel? In *Meggs v. Central Supply Co., Inc.*,¹⁴⁵ the court held that *S* was liable for sales made by *C* to *B* when *C* relied upon *S*'s continued ownership. Sellers of a business must take warning from this unique, but sound, decision and either notify former suppliers or limit the use of the seller's business name in the continuation of the business. The Bulk Sales Article of the Uniform Commercial Code affords a complementary type of protection by allowing creditors of the seller to reach the property passing to the buyer.¹⁴⁶

Ct. App. 1973), discussed in Townsend, *Secured Transactions and Creditors' Rights*, 1973 Survey of Indiana Law, 7 IND. L. REV. 226, 241-42 (1973).

¹⁴³Cf. *Figg v. Snook*, 9 Ind. 202 (1857) (holding that proceedings supplemental were a substitute for an equity suit denominated as a creditor's bill).

¹⁴⁴As a general rule, equity will follow the law and, if a claim is barred by the statute of limitations at law, it will be barred in equity. Cf. *McKinney v. Springer*, 3 Ind. 59 (1851) (equity followed the law as to the statute of limitations, including provisions extending time). Laches may bar a claim within a time shorter than the statute of limitations. Compare *Hegarty v. Curtis*, 121 Ind. App. 74, 95 N.E.2d 706 (1950), with *Ryason v. Dunten*, 164 Ind. 85, 73 N.E. 74 (1905).

¹⁴⁵307 N.E.2d 288 (Ind. Ct. App. 1974).

¹⁴⁶A bulk sale is defined as the sale of a "major part" of the seller's inventory or a "substantial part" of his equipment if sold in connection with a bulk transfer of inventory. UNIFORM COMMERCIAL CODE § 6-102. The sale may be avoided by the seller's creditors who become such prior to the sale or prior to receiving notice as required by the Code. The sale will not be avoided if a schedule of assets and creditors is furnished by the seller and notice of the sale is given to the creditors. *Id.* §§ 6-104 to 6-108. See *First Nat'l Bank v. Crone*, 301 N.E.2d 378 (Ind. Ct. App. 1973). This case is discussed at text accompanying notes 46-50 *supra*.

XIII. Torts

*Cleon H. Foust**

During the survey period, the Indiana courts have continued to keep pace with the general trends in the law of torts. One trend is to expand the base of recovery for tortious conduct by recognizing rights and duties¹ and by removing traditional immunities.² A second trend is to grant increasing recognition to individual rights, particularly in cases involving liability for defamation.³ A third trend is to consolidate the many varied and intricate qualitative standards of care applicable in negligence cases into a general standard requiring the use of due care under all of the circumstances.⁴ Not all tort cases decided under Indiana law are discussed herein. An effort has been made, however, to discuss those cases which may be of importance to the practitioner.

A. Intentional Torts

In *Saloom v. Holder*,⁵ the court of appeals clarified Indiana's position concerning the tort liability of a police officer who arrests an individual for the violation of a law subsequently declared unconstitutional. Assuming, without deciding, that the statute under which the plaintiff was arrested was unconstitutional, the *Saloom* court held that a police officer is protected under color of law if the arrest were made in good faith.⁶ The court set forth the caveat, however, that there is Indiana authority to the contrary with respect to lay persons who precipitate or make an arrest of another on the basis of a statute subsequently declared uncon-

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¹See, e.g., *Brattain v. Herron*, 309 N.E.2d 150 (Ind. Ct. App. 1974).

²See, e.g., *Campbell v. State*, 284 N.E.2d 73 (Ind. 1972); IND. CODE §§ 34-4-16.5-1 to -18 (Burns Supp. 1974).

³See, e.g., *Gertz v. Robert Welch, Inc.*, 94 S. Ct. 2997 (1974).

⁴See, e.g., *Hammond v. Allegetti*, 311 N.E.2d 821 (Ind. 1974); *Ayr-Way Stores, Inc. v. Chitwood*, 300 N.E.2d 335 (Ind. 1973) (products liability).

⁵304 N.E.2d 217 (Ind. Ct. App. 1973).

⁶*Id.* at 220. This holding is in accord with the general view. See W. LAFAYE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 47, at 366 (1972); R. PERKINS, CRIMINAL LAW 924 (2d ed. 1969); MODEL PENAL CODE § 204(3)(b). See also W. PROSSER, LAW OF TORTS § 25, at 128 (4th ed. 1971) [hereinafter cited as PROSSER].

stitutional.⁷ Hopefully, this caveat was set forth as a suggestion to extend, in a proper fact situation, the same protection to laymen. The distinction between police officers and laymen in this context is difficult to justify. It is folly to presume that either police officers or laymen will be able to anticipate the ultimate resolution of the difficult legal questions presented when the constitutionality of a state statute is challenged.

Three cases decided during the survey period involved defamation privileges. In *Meirs v. Combs*,⁸ the court of appeals held that statements made in a pleading are absolutely privileged if they are pertinent or relevant to the judicial proceedings. Relevancy is a question of law, and statements in a pleading should be liberally construed in favor of relevancy. On the other hand, in *Sanders v. Stewart*,⁹ the "presumptive privilege" conferred by Indiana Code section 22-4-17-9¹⁰ upon persons who furnish information to the Indiana Employment Security Division was held to be a qualified privilege which could be overcome by an affirmative showing of falsity and malice. Finally, in *Big Wheel Restaurants, Inc. v. Bronstein*,¹¹ the court of appeals followed the general rule that the federal privilege does not apply to statements made with actual malice.

The problems involved with "defamation per se" classifications and the constitutional privilege are complicated by the recent United States Supreme Court decision in *Gertz v. Robert Welch, Inc.*¹² In *Gertz*, the Supreme Court refused to extend the *New York Times, Inc. v. Sullivan*¹³ privilege to cover cases involving the defamation of private individuals and held that the states may provide for the compensation of private individuals by any appropriate standard short of strict liability.¹⁴ The Court further held that private individuals may not recover presumed or puni-

⁷*Coleman v. Mitnick*, 137 Ind. App. 125, 202 N.E.2d 577 (1964).

⁸297 N.E.2d 436 (Ind. Ct. App. 1973).

⁹298 N.E.2d 509 (Ind. Ct. App. 1973).

¹⁰IND. CODE § 22-4-17-9 (Burns 1974).

¹¹302 N.E.2d 876 (Ind. Ct. App. 1973).

¹²94 S. Ct. 2997 (1974).

¹³376 U.S. 254 (1964). Dean Prosser calls the privilege conferred by the Court in *Sullivan* "the greatest victory won by the defendants in the modern history of the law of torts." PROSSER § 118, at 819.

¹⁴The majority in *Gertz* stated simply that the states may define the appropriate standards of liability "so long as they do not impose liability without fault . . ." 94 S. Ct. at 3010. In dissenting opinions, Justices Burger and White spoke in terms of liability for negligence. *Id.* at 3014, 3025. Justice Blackmun, concurring with the majority, also construed the majority opinion to condition liability on negligence. *Id.* at 3014. Thus, it would seem that the Court has created a watered-down privilege in cases in which the plaintiff is not a public figure.

tive damages without first showing that the defendant had "knowledge of falsity or reckless disregard for the truth."¹⁵ The Court spoke only to the issue of the liability of publishers and broadcasters and left open the question of the liability of other defamation defendants.¹⁶ Since per se classifications are based upon the concept of presumed damages,¹⁷ any per se classifications involving the liability of publishers and broadcasters must now include the requirement that the defendant act with reckless disregard of the truth or knowledge of the falsity of the defamatory statement. In all other cases, evidence of actual injury must be introduced, although actual injury is not limited to pecuniary loss and may include injury to reputation, mental distress, and personal humiliation.¹⁸ Since the holding in *Gertz* is based upon first amendment grounds, it is, of course, binding upon Indiana courts.

In *Soft Water Utilities, Inc. v. LeFevre*,¹⁹ a case involving an allegedly fraudulent sale of capital stock, the court of appeals discussed the various elements necessary for recovery based upon fraud. The most pertinent part of the court's discussion is that which concerns the element of reliance. The court stated that a person relying on a misrepresentation is "bound to use ordinary care and diligence to guard against fraud," but a person "has a right to rely on representations where the exercise of reasonable prudence does not dictate otherwise."²⁰ One difficulty which arises with the use of the phrase "ordinary care" in fraud cases is that one soon reaches the logical, but erroneous, conclusion that contributory negligence is a defense to an intentional tort. Counsel must remember that, when a court uses the phrase "ordinary care" in fraud cases, it means that the element of justifiable reliance is not satisfied when plaintiff's conduct is altogether foolish.²¹ The phrases "reasonable prudence," "reasonable reliance," and "ordinary care" should be eliminated from the causal requirement of justifiable reliance²² and should be appropriate only in cases of negligent misrepresentation.

¹⁵*Id.* at 3011.

¹⁶Justice White stated in his dissenting opinion that the majority in *Gertz* was concerned with the "communications industry." *Id.* at 2032.

¹⁷See PROSSER § 112, at 762.

¹⁸94 S. Ct. at 3012.

¹⁹308 N.E.2d 395 (Ind. Ct. App. 1974).

²⁰*Id.* at 398.

²¹See PROSSER § 108, at 715.

²²The Advisors to the *Restatement* have recommended that the following language be adopted: "Failure of the recipient of a fraudulent misrepresentation to investigate it does not prevent his justifiable reliance upon it, although he might have ascertained the falsity of the representation by such investigation." RESTATEMENT (SECOND) OF TORTS § 540, at 126 (Tent. Draft No. 10,

B. Negligence

The expansion of individual rights and duties has been particularly apparent in negligence cases. In *Brattain v. Herron*,²³ the sister of a person under twenty-one years of age knowingly permitted him to consume alcoholic beverages at her home with knowledge that he would soon be driving his car on a public highway. He left her home intoxicated and, shortly thereafter, was involved in an automobile accident in which four persons were killed. The decedents' representatives brought a consolidated action against the minor's sister on the grounds that she violated an Indiana statute which makes it illegal to sell, exchange, barter, give, provide or furnish alcoholic beverages to a person under the age of twenty-one,²⁴ and that the violation of the statute constituted negligence per se. A substantial verdict was rendered in favor of the plaintiffs and the defendant appealed on the ground that the trial court erred when, *inter alia*, it submitted the issue of negligence to the jury. The court of appeals followed the general rule that the "violation of a statute enacted for safety reasons is negligence per se"²⁵ and held that, under prior law,²⁶ the statute in question was deemed a safety regulation. With this established, the *Brattain* court held that the issues of negligence and proximate cause were properly submitted to the jury. The court refuted the defendant's contention that the statute confers negligence liability only upon persons who sell alcoholic beverages, but carefully limited its holding to cases in which a person furnishes liquor to a minor with either subjective or objective knowledge that the minor would later be driving on a public highway.²⁷

Proof of the violation of a statute enacted for safety reasons does not, in itself, establish liability. In *Surratt v. Petrol, Inc.*,²⁸ the issue of negligence liability arose from the theft of a car in which the defendant had left his ignition key. The court held, as a matter of law, that the negligent leaving of ignition keys in a parked automobile "could not be considered the proximate cause of injuries later resulting from the negligent operation of the

1964). The Advisors rejected the recommendation of the American Law Institute Council, which voted eleven to nine to have the section read: "The recipient of a fraudulent misrepresentation is justified in relying upon its truth without investigation, unless he knows of facts which make his reliance unreasonable." *Id.* (emphasis added).

²³309 N.E.2d 150 (Ind. Ct. App. 1974).

²⁴IND. CODE § 7-1-1-32(10) (Burns 1972).

²⁵309 N.E.2d at 156.

²⁶*Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966).

²⁷309 N.E.2d at 157.

²⁸312 N.E.2d 487 (Ind. Ct. App. 1974).

stolen automobile by a thief.”²⁹ The court refused to adopt the rule of some jurisdictions that the owner is liable for such injuries when the ignition key is left in a car parked in a “high crime area.”³⁰ Throughout its opinion, the court postulated the negligence of the defendant on the basis of a statute which makes it illegal to leave a motor vehicle unattended without first removing the ignition key.³¹ If negligence is to be postulated on the ground that a thief’s erratic driving is one of the foreseeable risks which a statute is designed to prevent, so that violation of the statute is negligence, then it is difficult to understand why the risk was not foreseeable and thus a proximate consequence of the defendant’s act.³² Since it is not unusual for a “no duty” case to be decided under the guise of proximate cause, one suspects that the true basis of the holding in *Surratt* was the defendant’s lack of duty.

In *Memorial Hospital v. Scott*,³³ the supreme court considered the proper application of the reasonable man standard to the issue of contributory negligence. The plaintiff, a multiple sclerosis victim who was taking medication, was severely burned when he mistakenly activated a hot water knob located near the flusher of a toilet he was using. After a trial on the issues of negligence and contributory negligence, the jury returned a verdict in favor of the defendant. Upon the plaintiff’s filing of a motion to correct errors, the trial court weighed the conflicting evidence and ordered a new trial. In support of its findings of fact, the trial court concluded that the plaintiff was not contributorily negligent because he was unaware of the hot water knob and the dangers it presented. The court of appeals reversed on the ground that the trial court had erroneously reached this conclusion by considering the physical and mental ailments of the plaintiff in regard to the issue of contributory negligence. The supreme court reversed the decision of the court of appeals and held that the proper test to be applied is the “test of a reasonably prudent man suffering from the same maladies and disabilities under like circumstances

²⁹*Id.* at 490.

³⁰*Cf.* *Kiste v. Red Cab, Inc.*, 122 Ind. App. 587, 596, 106 N.E.2d 395, 399 (1952).

³¹Although the *Surratt* court did not expressly mention IND. CODE § 9-4-1-116 (Burns 1973), which makes it illegal to leave a motor vehicle unattended without first removing the ignition key, the court based its holding on *Kiste v. Red Cab, Inc.*, 122 Ind. App. 587, 106 N.E.2d 395 (1952). The action brought by the plaintiff in *Kiste* was based upon the violation of this statute.

³²The test of causation in Indiana is reasonable foreseeability. *City of Indianapolis v. Falvey*, 296 N.E.2d 896 (Ind. Ct. App. 1973).

³³300 N.E.2d 50 (Ind. 1973).

...³⁴ This holding is in accord with the general rule that “[a]s to his physical characteristics, the reasonable man may be said to be identical with the actor.”³⁵

The proper application of the reasonable man standard also involves a consideration of the age, intelligence and experience of a child who is alleged to have been contributorily negligent. In *Stewart v. Jeffries*,³⁶ the plaintiff, a young boy, was injured when he attempted to mount the running board of a truck driven by defendant. Although the child admitted on cross-examination that he recognized the risks involved in mounting the truck,³⁷ the trial court found the evidence bearing upon the issue of contributory negligence to be sufficiently conflicting to warrant its consideration by the jury. The defendant appealed from a judgment for the plaintiff and contended that the child should have been held contributorily negligent as a matter of law. The court of appeals affirmed, holding that contributory negligence is an issue for the jury whenever “reasonable men could differ on whether the evidence or reasonable inferences to be drawn therefrom showed that the appellee exhibited conduct which was below that of a child of like age, intelligence and experience.”³⁸

The *Jeffries* court also spoke to the issue of whether the defendant driver owed an absolute duty to maintain a look-out for the plaintiff.³⁹ In resolving this issue in favor of the plaintiff, the court relied upon *Indianapolis Harbor Belt Railroad v. Jones*,⁴⁰ in which it was held that “the probable presence of children upon property where a dangerous activity is being carried on imposes a duty of ordinary care . . . to anticipate their presence by keeping a look-out for them.”⁴¹ Although the application of this rule has the proper effect of exacting the appropriate quantum of care from the defendant, it is confusing to phrase general rules of negligence in terms of “absolute duty.” In negligence cases, the defendant is bound by a duty to exercise reasonable care under the circumstances. Whether a look-out is required depends upon the facts and circumstances of a particular case. Thus, it is more logically said that the duty of reasonable care may require that one maintain a look-out for children when he knows or should know that children are likely to be present in the area in which he is driving.

³⁴*Id.* at 56.

³⁵PROSSER § 32, at 151.

³⁶309 N.E.2d 443 (Ind. Ct. App. 1974).

³⁷*Id.* at 445.

³⁸*Id.* at 446.

³⁹*Id.* at 447.

⁴⁰220 Ind. 139, 41 N.E.2d 361 (1942).

⁴¹*Id.* at 145, 41 N.E.2d at 363, quoting from 14 IND. L.J. 376, 377 (1939).

Some of the formulas which have been invented by the courts to solve particular fact situations still persist. The doctrine of "sudden peril" or "sudden emergency" set forth in *Bundy v. Ambulance Indianapolis Dispatch, Inc.*⁴² is one such formula and is normally used as an exculpatory answer to the defense of contributory negligence. The doctrine provides that when a person is confronted with a sudden emergency not caused by his own negligence, and when the appearance of the danger was so imminent that he had no time to deliberate, "he is not held to the same accuracy of judgment as would have been required of him if he had had time for deliberation."⁴³ Although the person relying upon the doctrine must have been aware of the danger prior to the injury, such awareness need only be momentary. In all of its intricacy, the formulation of the doctrine is nothing more than a complicated way of saying that a person must adhere to the standard of a reasonable and prudent man under all of the circumstances, and one circumstance to be considered is whether the plaintiff or defendant was confronted with an emergency situation.⁴⁴

C. Premises Liability

Three cases decided during the survey period indicate, however slightly, that Indiana courts are departing from the outmoded common law rules pertaining to "premises liability" and are moving toward the modern standard of reasonable care under the circumstances.⁴⁵ In *Hammond v. Allegretti*,⁴⁶ the supreme court resurrected the basic principle that the duty of reasonable care owed to invitees is a full one which should not be diminished by arbitrary and rigid rules based upon the presence of one particular circumstance in a given case. In *Hammond*, the plaintiff was injured when she slipped and fell in the defendant's icy open-air parking lot. The trial court granted the defendant's motion for summary judgment on the ground that the defendant was under no duty to remove the snow and ice from the lot, and the court

⁴²301 N.E.2d 791 (Ind. Ct. App. 1973).

⁴³*Id.* at 792.

⁴⁴

The conduct required is still that of a reasonable man under the circumstances, as they would appear to one who is using proper care, and the emergency is only one of the circumstances.

PROSSER § 33, at 169.

⁴⁵*See, e.g.,* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Note, *Premises Liability: A Critical Survey of Indiana Law*, 7 IND. L. REV. 1001 (1974).

⁴⁶311 N.E.2d 821 (Ind. 1974).

of appeals affirmed. In a well reasoned opinion, the supreme court, reversing a line of appellate court decisions⁴⁷ which held that a landowner was under no duty to remove natural accumulations of ice and snow from his private parking lot, ruled that the possessor owed to invitees a duty of reasonable care under all of the circumstances. The court emphasized that it was not establishing a rigid rule which requires landowners to immediately remove natural accumulations of ice and snow from their premises.⁴⁸ The court recognized that what is reasonable in one situation might be unreasonable in another. Whether the landowner exercised reasonable care in removing or failing to remove ice and snow from his premises is a question for the jury to determine in light of the evidence.⁴⁹ The approach taken by the *Hammond* court is both sensible and realistic. Hopefully, it will soon be extended to cases involving licensees and trespassers.

In *Surratt v. Petrol, Inc.*,⁵⁰ in an effort to determine by analogy the duty of care owed by a private citizen to a trespasser on a chattel, the court of appeals surveyed the Indiana law with regard to a landowner's duty to discovered trespassers. After considering a number of cases, the court concluded that "[a]n owner or occupier owes a duty of reasonable care to a discovered trespasser not to injure him through active conduct."⁵¹ Although the above statement was clearly dictum, it is indicative of the court's proclivity to create an "active negligence" exception to the general rule that the only duty owed by a possessor to licensees and trespassers is to refrain from wilfully or intentionally injuring them.⁵² The fact that the active negligence exception to the general rule has resurfaced after having been twice overruled in previous years⁵³ suggests that the courts will continue to dilute the common law rules in an effort to mitigate their harsh and inflexible operation.

The determination of the liability of vendors and lessees of premises continues to be fairly complex. A lessor, as a general rule, is insulated from negligence liability to persons injured by a defective condition which existed at the time the lease was executed.⁵⁴ An exception to this rule arises when premises are

⁴⁷*Hammond v. Allegretti*, 288 N.E.2d 197 (Ind. Ct. App. 1972); *Kalicki v. Beacon Bowl, Inc.*, 143 Ind. App. 132, 238 N.E.2d 673 (1968).

⁴⁸311 N.E.2d at 826.

⁴⁹*Id.* at 828.

⁵⁰312 N.E.2d 487 (Ind. Ct. App. 1974).

⁵¹*Id.* at 494.

⁵²*E.g.*, *Calvert v. New York Central R.R.*, 210 Ind. 32, 199 N.E. 239 (1936).

⁵³*Indiana Harbor Belt R.R. v. Jones*, 220 Ind. 139, 41 N.E.2d 361 (1942); *Fort Wayne Nat'l Bank v. Doctor*, 272 N.E.2d 876 (Ind. Ct. App. 1971).

⁵⁴PROSSER § 63, at 400.

leased for a purpose which contemplates the admission of the public. In this situation, the lessor owes a duty of reasonable care and must make reasonable inspections and repairs before transferring possession to the lessee.⁵⁵ Thus, a lessor who fails to prevent the public's exposure to unreasonable risks of harm is liable to members of the public for both personal injury and property damage caused by his negligence.

In *Chrysler Corp. v. M. Present Co.*,⁵⁶ the Court of Appeals for the Seventh Circuit applied the public purpose exception to a commercial warehouse setting and held that a lessor may be liable for the destruction of goods stored in the warehouse by members of the public. Prior to *Present*, the exception was applied only to situations in which premises were leased with the primary expectation that members of the public would be physically present thereon.⁵⁷ In *Present*, however, the premises were leased with the primary expectation that they would be used for the storage of goods, and the physical presence of the public was only incidental to that purpose. In finding potential liability, the court relied heavily upon the assumption that lessees are generally in possession for a limited period of time and, consequently, do not have as great an incentive to maintain the premises as the lessor.⁵⁸ Dean Prosser, however, has suggested that the true basis of liability in this situation is the "likelihood that the public would be permitted to enter before the dangerous condition is changed."⁵⁹ In *Present*, the lease had been in effect for two years at the time the goods were destroyed. This raises the question of whether a lessor should be held responsible for the defective conditions when a sufficient length of time has passed during which a reasonable and prudent tenant should have become aware of the conditions and should have had the opportunity to make the premises safe for the reception of the public and its goods.⁶⁰

⁵⁵*Id.* at 403.

⁵⁶491 F.2d 320 (7th Cir. 1974) (applying Indiana law).

⁵⁷*Id.* at 324.

⁵⁸*Id.*

⁵⁹PROSSER § 63, at 405.

⁶⁰Only the following comment is made in the *Restatement*:

The lessor is subject to liability for only such injuries as are caused to invitees of his lessee by the dangerous condition during the time within which the lessor had reason to believe that it would remain unchanged.

RESTATEMENT (SECOND) OF TORTS § 359, comment i at 248. Dean Prosser states that "it is logical that [liability] should be limited to the time within which there is reason to believe that [a defect existing when possession is transferred] will remain unaltered." PROSSER § 63, at 405.

D. Strict Liability

In *Ayr-Way Stores, Inc. v. Chitwood*,⁶¹ the plaintiff brought an action on behalf of his son against the seller of a defective lawn mower for injuries sustained when the braking mechanism of the mower failed. In ruling upon a number of procedural questions raised on appeal, the supreme court recognized section 402A of the *Restatement (Second) of Torts*,⁶² which imposes strict liability on manufacturers and sellers of defective products which injure a purchaser or user. Prior to *Chitwood*, the supreme court had not specifically approved section 402A. However, the courts of appeal and the federal courts, in applying Indiana law, had recognized the rule and had vigorously expanded its application.⁶³ In addition to adopting section 402A, the *Chitwood* court held that breach of warranty was an additional basis for recovery.

E. Limitations on Liability

In *Chaffin v. Nicosia*,⁶⁴ the supreme court held that Indiana's legal disability statute⁶⁵ creates an exception to the otherwise absolute two year statute of limitations for medical malpractice actions.⁶⁶ The plaintiff, within two years after his legal disability of infancy was removed, brought an action for injuries which he allegedly sustained at birth because of the negligence of the defendant doctor. The trial court sustained the defendant's motion for a judgment on the pleadings on the basis of a prior federal court decision in which it was held that the legal disability statute was inapplicable to malpractice actions.⁶⁷ The supreme court reversed and construed the legal disability statute to be an exception to the absolute bar of medical malpractice actions commenced more than two years from the date of the alleged act of negligence. The court noted that, although a legal disability does not toll the statute of limitations, it provides "a reasonable grace period within which to sue once a disability is removed."⁶⁸ The fact that the plaintiff was permitted to maintain an action almost twenty

⁶¹300 N.E.2d 335 (Ind. 1973).

⁶²RESTATEMENT (SECOND) OF TORTS § 402A (1965).

⁶³See, e.g., *Filler v. Rayex Corp.*, 435 F.2d 336 (7th Cir. 1970); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *Cornette v. Searjeant Metal Prods., Inc.*, 147 Ind. App. 46, 258 N.E.2d 652 (1970); Note, *Products Liability in Indiana: Can the Bystander Recover?*, 7 IND. L. REV. 403 (1973).

⁶⁴310 N.E.2d 867 (Ind. 1974).

⁶⁵IND. CODE § 34-1-2-5 (Burns 1973).

⁶⁶*Id.* § 34-4-19-1.

⁶⁷*Burd v. McCullough*, 217 F.2d 159 (7th Cir. 1954). See also *Guy v. Schuldt*, 236 Ind. 101, 138 N.E.2d 891 (1956).

⁶⁸310 N.E.2d at 870.

years after the alleged negligence occurred is likely to increase the already expensive rates for malpractice insurance.

During the survey period, both the courts and the legislature have attempted to identify the parameters of the vestige of governmental immunity remaining in Indiana law after the decision of *Campbell v. State*.⁶⁹ The legislative event was the enactment of a new Tort Claims Act which limits the tort liability of the state and sets forth the procedures through which aggrieved parties must seek relief.⁷⁰ Among its significant provisions is one that limits the liability of the state and its employees to \$300,000 for the death or injury of one person and to \$5,000,000 for all deaths or injuries arising from a single occurrence.⁷¹ Complex notice provisions are set forth and persons asserting a claim against the state must file written notice with the attorney general and the appropriate state agency within 180 days after the loss occurs.⁷² Within ninety days after filing, the state must notify the claimant of its approval or denial of the claim,⁷³ and suit may be brought only after the claim has been denied in whole or in part.⁷⁴ Unless a settlement has been reached, a claim is considered denied if the state fails to approve it in its entirety during the ninety day period.⁷⁵ The governor is authorized to settle the claim⁷⁶ and the attorney general must advise him as to the desirability of settlement.⁷⁷

A major provision of the Act states that a governmental entity or employee is not liable for losses resulting from certain conditions of land, the initiation of judicial or administrative proceedings, the performance of discretionary functions, the enforcement of or failure to enforce a law, or an act or omission performed under the apparent authority of an invalid statute if liability would not have attached had the statute been valid.⁷⁸ These standards, with the exception of those relating to conditions of land, were previously utilized by the courts to immunize state

⁶⁹284 N.E.2d 733 (Ind. 1972). For a comparison of the status of sovereign immunity in various states in 1954 and in 1973, compare Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1363 (1954), with RESTATEMENT (SECOND) OF TORTS, *Special Notes* § 895B & C, at 12-22 (Tent. Draft No. 19, 1973).

⁷⁰Ind. Pub. L. No. 142 (Feb. 19, 1974), *codified at* IND. CODE §§ 34-4-16.5-1 to -18 (Burns Supp. 1974).

⁷¹IND. CODE § 34-4-16.5-4 (Burns Supp. 1974).

⁷²*Id.* § 34-4-16.5-6.

⁷³*Id.* § 34-4-16.5-10.

⁷⁴*Id.* § 34-4-16.5-12.

⁷⁵*Id.* § 34-4-16.5-10.

⁷⁶*Id.* § 34-4-16.5-13.

⁷⁷*Id.* § 34-4-16.5-14.

⁷⁸*Id.* § 34-4-16.5-3.

employees, acting within the scope of their authority, from personal tort liability.⁷⁹ Accordingly, the doctrine of respondeat superior is now the touchstone of state liability. The state, in its capacity as master, is immune from liability in the same situations in which state employees were immune from personal tort liability at common law.⁸⁰ However, since the respondeat superior approach was first suggested by the *Campbell* court, the Act does little more than codify existing case law.

The ministerial-discretionary distinction set forth in the Act was suggested by the *Campbell* court as a means of delineating the areas of governmental activity for which no liability would attach.⁸¹ One wonders, however, to what extent the distinction between discretionary and ministerial functions will be easier to make than the pre-*Campbell* distinction between governmental and proprietary functions.⁸² In addition to suggesting that the state will be liable only if the injury was caused by an employee performing a ministerial function, the *Campbell* court held that "[i]n order for one to have standing to recover in a suit against the State, there must have been a breach of a duty owed to a private individual."⁸³ Now that the legislature has distinguished between discretionary and ministerial functions in exempting the state from liability, a question is raised as to whether inquiry into the existence of a ministerial or discretionary function is a separate and distinct inquiry from inquiry into the existence of a private duty.

In *Roberts v. State*,⁸⁴ the court of appeals held that a complaint which alleged the *breach of private duty* was sufficient to withstand a motion to dismiss and declined to explore the "applicability of the discretionary-ministerial dichotomy."⁸⁵ After

⁷⁹See, e.g., *Wallace v. Feehan*, 206 Ind. 522, 190 N.E. 438 (1934) (discretionary-ministerial distinction); *Saloom v. Holder*, 304 N.E.2d 217 (Ind. Ct. App. 1973) (unconstitutional statute); Note, *Sovereign Immunity in Indiana—Requiem?*, 6 IND. L. REV. 93, 102-05 (1972).

⁸⁰Cf. Note, *supra* note 79, at 98.

⁸¹284 N.E.2d at 737.

⁸²See *Perkins v. State*, 252 Ind. 549, 251 N.E.2d 30 (1969); Note, *Separation of Powers and the Discretionary Function Exception: Political Questions in Tort Litigation Against the Government*, 56 IOWA L. REV. 930, 950 (1971). Much judicial effort has been expended in defining the flexible term "discretionary." Various meanings are included in the Federal Tort Claims Act, 28 U.S.C. § 2860(a) (1970), and in state statutory and common law. See RESTATEMENT (SECOND) OF TORTS § 895A, comment b at 8 (Tent. Draft No. 19, 1973); Note, *supra* note 79, at 104 n.60. See also *Dalehite v. United States*, 346 U.S. 15 (1953).

⁸³284 N.E.2d at 737.

⁸⁴307 N.E.2d 501 (Ind. Ct. App. 1974).

⁸⁵*Id.* at 506.

so holding, however, the court noted the recent enactment of the Tort Claims Act and stated that "a legislative standard now exists for future reference."⁸⁶ Since *Roberts* was decided nine days *after* the effective date of the Act,⁸⁷ it seems to have implicitly held that the Act does not apply retroactively. Similarly, in a case decided four months after the effective date of the Act, the court looked solely to the private duty test.⁸⁸ Thus, the question remains as to whether the private duty test is simply another means of expressing the ministerial-discretionary distinction,⁸⁹ or whether a plaintiff must prove both the breach of a private duty and the misperformance of a ministerial function before he will be permitted to recover.

The state may also be liable for the intentional torts of its agents. In *Roberts*, an inmate of the Indiana State Reformatory brought an action against the state and certain state employees for injuries he suffered during a prison disturbance. The trial court dismissed the complaint on the basis of the doctrine of sovereign immunity. The court of appeals reversed and held that the state may be liable under the doctrine of respondeat superior when its agents, acting within the scope of their authority, intentionally or negligently breach a private duty owed to the plaintiff.⁹⁰ This holding is consistent with the Tort Claims Act which, unlike the Federal Tort Claims Act,⁹¹ does not preclude suits against the sovereign for the intentional torts of its agents.

F. Damages

No landmark cases involving the issue of damages were decided during the survey period. Two cases involved the damage component of lost earning capacity. In *Scott v. Nabours*,⁹² the plaintiff introduced evidence at trial which indicated that, although he was able to continue his employment, his injury made his work more difficult to perform. The trial court expressly withdrew the element of impaired earning capacity from the jury's consideration because of a lack of evidence thereon. The court of appeals affirmed the action of the trial court and held that the "basic measure of damages for impairment of earning

⁸⁶*Id.* at 507.

⁸⁷The effective date of the Act was February 19, 1974. *Roberts* was decided on February 28, 1974.

⁸⁸*Scott County School Dist. 1 v. Asher*, 312 N.E.2d 131, 138 (Ind. Ct. App. 1974).

⁸⁹See Note, *supra* note 79, at 105.

⁹⁰307 N.E.2d at 506, 507.

⁹¹28 U.S.C. § 2680(h) (1970).

⁹²296 N.E.2d 438 (Ind. Ct. App. 1973).

capacity is the amount which the plaintiff was capable of earning before the injury and the amount which he is capable of earning thereafter.”⁹³ Since the plaintiff had failed to introduce any evidence which linked his injury to an impaired earning potential, the formula set forth by the court of appeals for ascertaining loss of earning capacity was incapable of application. In the similar case of *Cooper v. High*,⁹⁴ the plaintiff argued that, although he was able to maintain his employment after his injury, he was unable to perform work on an “exchange basis” with his friends and relatives.⁹⁵ The court of appeals refused to decide expressly whether work performed on an exchange basis can be considered in awarding damages for impaired earning capacity. However, the court implicitly rejected the damages rule as it applies to avocational activities by holding that, on the basis of *Scott*, the plaintiff had failed to take the “final step of relating his impairment to his vocation.”⁹⁶

Indiana courts continue to adhere to the minority rule that punitive damages cannot be awarded when the possibility exists that the tortfeasor will be subjected to criminal prosecution. In *Moore v. Waitt*,⁹⁷ the trial court refused to award punitive damages for the tort of conversion on the ground that the defendant was subject to criminal prosecution for theft. Finding no reason to depart from precedent, the court of appeals affirmed. Proponents of the minority rule have generally argued that an award of punitive damages in such cases would place a tortfeasor in the dilemma of being punished twice for the same offense.⁹⁸ On the other hand, opponents of the minority rule have contended that an award of punitive damages would punish conduct which, as a practical matter, “goes unnoticed by prosecutors occupied with more serious crimes.”⁹⁹

⁹³*Id.* at 441.

⁹⁴303 N.E.2d 829 (Ind. Ct. App. 1973).

⁹⁵*Id.* at 830.

⁹⁶*Id.*

⁹⁷298 N.E.2d 456 (Ind. Ct. App. 1973).

⁹⁸C. McCORMICK, LAW OF DAMAGES § 77, at 276 (1935). For a discussion of the rationales for the minority rule in Indiana, see Aldridge, *The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 IND. L.J. 123 (1945).

⁹⁹C. McCORMICK, *supra* note 98, § 77, at 276. The importance of making a timely objection to improper instructions is apparent from a consideration of the damages cases decided during the survey period. In both *Cooper* and *Scott*, the element of impaired earning capacity was submitted to the jury in an omnibus damage instruction. In *Cooper*, the defendant objected to the inclusion of impaired earning capacity and the omnibus instruction served as a basis for the reversal of the trial court's decision. In *Scott*, however, no objection was made and an instruction similar to the one used by the *Cooper*

In *Simms v. Bethlehem Steel Corp.*,¹⁰⁰ the plaintiff brought an action in the United States District Court for the Northern District of Indiana for the loss of her husband's consortium as a result of injuries he sustained while working at the defendant's plant. The defendant filed a motion to strike the plaintiff's allegation that she suffered mental anguish on the ground that mental anguish is not compensable unless it is incurred in conjunction with a physical injury. Judge Sharp granted the motion and held that the physical injury suffered by the plaintiff's husband was insufficient to meet the requirement that plaintiff also suffer actual physical injury.¹⁰¹ The holding in *Simms* should alert counsel to exercise care with semantics in cases involving loss of consortium. For example, the damages awarded for loss of consortium are based upon intangible emotional injuries such as deprivation of society, affection, comfort and sexual relations. In effect, recovery is permitted for mental distress under the guise of ancient terminology.

XIV. Trusts and Decedents' Estates

Melvin C. Poland*

A. Wills

1. Will Contest—The Limitation Period

During the current survey period the Indiana Court of Appeals was called upon to decide two cases involving the period of time in which an interested party may contest a will. In *Wilkinson v. Ritzman*,¹ plaintiff-appellants² filed a complaint contesting a will approximately six and one-half months after the original petition for

court was permitted to stand. A similar example is found in the *Moore* case and in *Richards v. Scroggham*, 307 N.E.2d 80 (Ind. Ct. App. 1974). In *Richards*, the defendant failed to object to an instruction which permitted an award of punitive damages for the tort of conversion. Although the award of punitive damages for conversion was previously held by the *Moore* court to be improper, the *Richards* court upheld the instruction on the basis of the defendant's failure to make a timely objection.

¹⁰⁰40 Ind. Dec. 473 (N.D. Ind. 1973).

¹⁰¹*Id.* at 475-76.

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The author wishes to express his appreciation to James Greives and Randy Young for their assistance in the preparation of this discussion.

¹301 N.E.2d 847 (Ind. Ct. App. 1973).

²Hereinafter referred to as appellants.

probate was filed and the will admitted to probate. Defendant-appellees³ filed a motion to dismiss pursuant to Trial Rule 12(B)(6) alleging that the contest action was barred by a six month limitation period which commenced when the will was offered for probate.⁴ The trial court sustained the motion to dismiss and the court of appeals affirmed.

Appellants argued the limitation period for contesting the will did not commence when the will was offered for probate because the petition for probate was defective. This argument was grounded on the fact that the original petition for probate did not list all the devisees and legatees, their ages, relationships and addresses as required by statute.⁵ This deficiency was corrected by the filing of an amended petition less than two months after the will had been admitted to probate.⁶ On oral argument, the appellants, relying on *Estate of Cameron v. Kuster*,⁷ also contended that, if there is a

³Hereinafter referred to as appellees.

⁴IND. CODE § 29-1-7-17 (Burns 1972) states: "Any interested person may contest the validity of any will or resist probate thereof, at anytime within six (6) months after the same has been offered for probate"

⁵*Id.* § 29-1-7-5. The original petition, filed September 3, 1970, and admitted to probate September 4, 1970, contained the names, addresses, and ages of only five of the twenty-three devisees and legatees. It then added just below these names: "plus all the legatees and devisees named in the will." 301 N.E.2d at 848. The statute provides that a petition for probate "shall state . . . the name, age and place of residence of each legatee and devisee, in the event the decedent left a will, so far as such are known or can with reasonable diligence be ascertained by the personal representative" IND. CODE § 29-1-7-5 (Burns 1972) (emphasis added).

⁶The amended petition, also referred to as an "Application for Letters Testamentary," was entered of record on October 20, 1970, and contained the names, addresses and ages of all twenty-three devisees and legatees.

⁷142 Ind. App. 645, 236 N.E.2d 626 (1968). In *Cameron*, the trial court, upon motion of the executor to correct the record, admitted an alleged codicil to probate under a *nunc pro tunc* order nearly two years after the original will was admitted to probate. The trial court's order book entry stated:

That such written instrument purporting to be a codicil to such decedent's Last Will and Testament was duly executed in all respects according to law, has been duly proven as a codicil to the Last Will and Testament of decedent herein and is entitled to be admitted to probate as such in such County.

Id. at 646, 236 N.E.2d at 626-27.

The purported "codicil" was neither signed by the testatrix nor attested to by two witnesses as required by law; hence the finding that the codicil was executed in all respects according to law was unwarranted. The court noted that, although generally an attack on the validity of a will must be made within the period allowed by IND. CODE § 29-1-7-17 (Burns 1972), there is nevertheless a very limited exception to the rule, *i.e.*, when the instrument for which admission to probate is sought shows on its face that it was non-testa-

statutory defect in the probate proceedings, a will contest is proper at any time. In responding to this argument, the court stated that the *Cameron* court only recognized the right of collateral attack after the statutory time "when there was a statutory defect in the will" and not in the petition.⁸

In response to the appellants' principal argument, the court noted that no notice is required for admission of a will to probate.⁹ It is only necessary that the court find the decedent to be dead and the will duly executed according to law.¹⁰ A defect in the petition for admission will not invalidate the proceedings because the Probate Code specifically provides that "no defect in form or substance in any petition nor the absence of a petition, shall invalidate any proceeding."¹¹

In *Brown v. Gardner*,¹² the plaintiff-appellant,¹³ alleging generally the statutory grounds for contest,¹⁴ instituted an action to contest the will of the decedent nearly fifteen months after it was admitted to probate. Defendant-appellees filed a motion to dismiss pursuant to Trial Rule 12(B) (6) asserting the action was barred by the six month limitation period for contest.¹⁵ The trial court sustained the motion to dismiss and the court of appeals affirmed. It was the appellant's contention that, having alleged fraud in her

mentary, because it was not duly executed, such order admitting the instrument to probate may be collaterally attacked at any time.

⁸301 N.E.2d at 849.

⁹IND. CODE § 29-1-7-4 (Burns 1972).

¹⁰*Id.* § 29-1-7-13.

¹¹*Id.* § 29-1-1-9. It could be argued that the court might have based its decision on the lack of any defect in the original petition. The only claimed defect, as previously stated, was the failure to list the ages, addresses and relationships of all legatees and devisees. The Probate Code requires such listings only "so far as known or can with reasonable diligence be ascertained." *Id.* § 29-1-7-5. The court said the omitted data was unknown at the time of the first petition but was provided by amended petition. Thus it would appear that the original petition was also in compliance with the requirements of the statute.

¹²308 N.E.2d 424 (Ind. Ct. App. 1974).

¹³Hereinafter referred to as appellant.

¹⁴IND. CODE § 29-1-7-17 (Burns 1972) reads as follows:

Any interested person may contest the validity of any will or resist the probate thereof, at any time within six (6) months after the same has been offered for probate, by filing in the court having jurisdiction of the probate of the decedent's will his allegations in writing verified by affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress, or was obtained by fraud, or any other valid objection to its validity or the probate thereof; and the executor and all other persons beneficially interested therein shall be made defendants thereto.

¹⁵*Id.*

complaint, she was not bound by the six month limitation period for three reasons: (1) Indiana Code section 29-1-1-21,¹⁶ which permits the vacation of orders entered during the administration of an estate, extends the time for contesting a will, (2) under the doctrine of *Estate of Cameron v. Kuster*,¹⁷ the order of the probate court was subject to collateral attack, and (3) equity would permit her belated attack.

Appellant's first argument was rejected. The court, after examining the relevant Code provisions,¹⁸ concluded that to construe the general section relative to vacation and modification broadly enough to include will contests would be contrary to the statute's intended coverage and contrary to the Probate Code's general policy of expediting the administration of estates.¹⁹ The court thus rejected a broad construction and held that the limitation period of the statute relating to will contests was controlling.

The appellant's second argument was the same as was made on oral argument in *Wilkinson*—that the contest was permitted under the doctrine of *Cameron*. The *Wilkinson* court held that *Cameron* allows a collateral attack after the time permitted by statute for contest only when a statutory defect appears on the face of the purported will. In the instant case it appeared from the pleadings that the will was regular on its face and executed in all respects according to law. Therefore, the allegations did not bring the case within the *Cameron* doctrine.

The gist of appellant's third argument was that an allegation of fraud, per se, avoids the statutory bar. At the outset of its opinion, the court noted that a will contest proceeding is a statutory action and generally only can be brought and successfully maintained within the time and upon the grounds prescribed by the statute.²⁰ However, the court also noted that an exception to this

¹⁶*Id.* § 29-1-1-21 provides in part:

For illegality, fraud or mistake, upon application filed within one (1) year after the discharge of the personal representative upon final settlement, the court may vacate or modify its orders, judgments and decrees or grant a rehearing therein.

¹⁷142 Ind. App. 645, 236 N.E.2d 626 (1968).

¹⁸IND. CODE §§ 29-1-1-21, -7-17 (Burns 1972).

¹⁹This conclusion was reached after an examination of the two Code provisions, *id.*, the statutes they replaced, and the relevant Commission comments. These indicated that the only change intended by the most recent amendments was that of reducing the limitation period in each statute.

²⁰*Evansville Ice & Cold-Storage Co. v. Winsor*, 148 Ind. 682, 48 N.E. 592 (1897); *Estate of Plummer v. Kaag*, 141 Ind. App. 142, 219 N.E.2d 917 (1966). In *Plummer*, the court, after first noting that IND. CODE § 29-1-7-17 (Burns 1972) is the only statutory means of questioning an order of probate under our present code, stated:

After a will has been probated in Indiana and thus judicially de-

rule was recognized in the case of *Forte v. White*.²¹ In *Forte*, the plaintiff complained that through the active fraudulent misrepresentation of the defendants, he had been induced to refrain from filing objection to probate within the proper time. The court sustained this complaint.²² The *Brown* court noted, however, that the exception is a narrow one, applicable only when the fraud is the "efficient cause for the failure to timely commence action, and the other elements entitling the party to equitable relief are present."²³ In *Brown*, the only fraud asserted was that one of the devisees named in the will was identified by a married name that she allegedly did not acquire until after the will had been executed. This allegation in no way indicated that the purported fraud was responsible for the delay in commencing the action and, therefore, the case was not within the *Forte* exception. The court further held that a defense based on the statute of limitations may properly be raised by a motion to dismiss under Trial Rule 12(B)(6).²⁴

2. Will Construction

Contrary to the majority of jurisdictions,²⁵ the Indiana courts have consistently held that when language of survivorship is used by a decedent in the disposition of his property, it is presumed that such language is not intended to postpone vesting and means survivorship of the testator only—not survivorship to the day of distribution.²⁶ This result has been reached by applying certain well-

clared to be duly executed, only a will contest can present any question of the validity of the instrument or of its execution. Such contests are purely statutory; they can only be brought within the time and upon the grounds prescribed by statute.

141 Ind. App. at 152, 219 N.E.2d at 922. The *Plummer* court also noted that statutory will contests are all encompassing and include actions to set aside a will because it has been revoked, proceedings to have probate annulled with a later will admitted, and actions to substitute a non-probated will for one probated.

²¹54 Ind. App. 210, 101 N.E. 27 (1913).

²²As the *Brown* court noted, the exception established in *Forte* was recognized by dicta in *Wilkinson v. Ritzmann*, 301 N.E.2d 847 (Ind. Ct. App. 1973), and *Estate of Plummer v. Kaag*, 141 Ind. App. 142, 219 N.E.2d 917 (1966).

²³308 N.E.2d at 428.

²⁴This follows the holding in *Wilkinson v. Ritzmann*, 301 N.E.2d 847 (Ind. Ct. App. 1973).

²⁵2 L. SIMES & C. SMITH, *THE LAW OF FUTURE INTERESTS* § 577, at 15-16 (2d ed. 1956).

²⁶*Burrell v. Jean*, 196 Ind. 187, 146 N.E. 754 (1925); *Alsman v. Walters*, 184 Ind. 565, 106 N.E. 879 (1916); *Aldred v. Sylvester*, 184 Ind. 542, 111 N.E. 914 (1916); *Busick v. Busick*, 65 Ind. App. 655, 115 N.E. 1025 (1917); *Smith v. Smith*, 59 Ind. App. 169, 109 N.E. 60 (1915).

established rules of construction.²⁷ However, the presumption in favor of early vesting is a rebuttable presumption. Thus, if the testator by clear and unambiguous language shows an intention to postpone vesting, then it becomes not only unnecessary but improper to resort to rules of construction.²⁸

In *Moorman v. Moorman*,²⁹ the Indiana Court of Appeals reversed the trial court and held that the language of survivorship found in decedent's will related to the death of the testator and not to the death of the life tenant. In paragraph five of his will, after giving his son a life estate in certain real property, the decedent gave "to all his [the son's] legitimate children *living at the time of his passing* the fee simple to said lands . . . or their legitimate descendants, share and share alike, in equal proportions and *subject to the life estate of John D. Moorman, Jr. therein.*"³⁰ This giving of a life estate in the first part of the limitation, followed by a gift in remainder in fee simple to the legitimate children of the life tenant "living at the time of his passing," raised the question of when the testator intended the remainder interest to vest—at the death of the life tenant or of the testator. The court of appeals recognized that, had paragraph five contained only the language creating the life estate in the son, with the remainder to his surviving children, it would have indicated an intent on the part of the testator to make the remainder interest contingent on the survival of the life ten-

²⁷Although these rules have been stated in various ways in earlier cases, the rules of construction now generally alluded to are those set forth in *Aldred v. Sylvester*, 184 Ind. 542, 111 N.E. 914 (1916), as follows:

(1) The law so favors the vesting of estates at the earliest opportunity and is so adverse to a postponement thereof that they will be deemed as vesting at the earliest possible period, in the absence of a *clear manifestation* of the contrary intention; (2) words of postponement are presumed to relate to the beginning of the enjoyment of the estate, rather than to its vesting; (3) words of survivorship are presumed to relate to the death of testator, rather than that of the first taker if they are fairly capable of such interpretation. . . .

It is also well settled by our decisions that courts will not construe a limitation into an executory devise when it can take effect as a remainder, nor a remainder to be contingent where it can be taken as vested.

Id. at 548-49, 111 N.E. at 916. The effect of applying these rules of construction is to hold that the survivorship provision relates to the death of the testator, *i.e.*, a substitutionary construction, rather than to hold that it relates to some later period of time such as death of the life tenant, *i.e.*, a contingent remainder construction.

²⁸*Aldred v. Sylvester*, 184 Ind. 542, 111 N.E. 914 (1916). The rule was held applicable in the inter vivos transfer situation of *Allen v. McKee*, 128 Ind. App. 329, 148 N.E.2d 343 (1958).

²⁹297 N.E.2d 836 (Ind. Ct. App. 1973).

³⁰*Id.* at 837 (emphasis added).

ant.³¹ However, because the testator gave the remainder interest in *fee simple*, the court of appeals found the language making the remainder interest "subject to the life estate" inconsistent with postponing the vesting of the fee simple.³² Having found the language ambiguous and without a clear manifestation of contrary intent, the court applied the rules of construction and concluded that *survivorship* related to the death of the testator and not to the death of the life tenant.

B. Trusts

In *First Federal Savings & Loan Association v. Baugh*,³³ the validity of a "Totten trust"³⁴ was expressly recognized for the first time in Indiana.³⁵ A "Totten trust" arises when a person deposits funds in a savings account in the name of the depositor "as trustee" for another person. It is presumed that the depositor intended to create a trust, "revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary."³⁶ The trust is absolute only as to the balance on hand at the death of the depositor.³⁷ In the *First Federal* case, two such accounts were opened at First Federal—one in the name of the depositor as trustee for a named son and the other in the name of the depositor as trustee for a named daughter. At the death of the depositor, his wife's

³¹*Id.*

³²*Id.* One may question whether the use of the words "fee simple" alone would not have been sufficient to make the devise ambiguous. In *Alsman v. Walters*, 184 Ind. 565, 567, 106 N.E. 879, 880 (1916), the testator bequeathed certain land to his son "during his natural life and after his death to his children surviving him in fee simple" In holding that the words "fee simple" were sufficient to create an ambiguity, the court said:

Appellee's contention would appeal with much stronger force were the phrase "in fee simple" eliminated; in such case, the term "surviving him" might better denote an intent to limit the vesting of the absolute estate in those children only who might survive the first taker. However, considering the language used in its entirety, we are of the opinion that a clear intention to create such an estate as is contended for by appellee is not manifested, and therefore it is necessary to resort to established rules for the construction of ambiguous devises.

Id. at 567, 106 N.E. at 880-81.

³³10 N.E.2d 101 (Ind. 1974).

³⁴The "Totten trust" derived its name from the famous New York case, *In re Totten*, 179 N.Y. 112, 71 N.E. 748 (1904). It is also commonly referred to as a "tentative trust" or "savings bank trust."

³⁵The court recognized that dicta in *Tullis v. First Nat'l Bank*, 60 Ind. 556 (1878), impliedly supported its conclusion in the instant case.

³⁶*In re Totten*, 179 N.Y. 112, 125, 71 N.E. 748, 752 (1904).

³⁷*Id.*

name was substituted as trustee on the accounts and new signature cards were issued specifically reserving to the wife the right to revoke the trusts. Thereafter the newly named trustee borrowed two separate sums of money from First Federal, each time executing forms purportedly transferring and assigning the one account as security for the loan. At the death of the depositor's wife, the personal representative of her estate initiated this action to recover the balances in the two accounts for her estate, naming as defendants First Federal, the two children named as beneficiaries of the accounts and another son of the depositor. In holding that the named beneficiaries were the only parties with an interest in the respective accounts as of the date of the depositor's death, the court applied the rule set forth in *In re Totten*³⁸ and stated that "a presumption arises that absolute trusts as to the balances in the accounts as of that date were created in favor of the respective beneficiaries" ³⁹ The court felt that this conclusion was supported not only by the authorities cited,⁴⁰ but also by the statutory language of section 28-1-20-1 (b) of the Indiana Code, which authorizes banks or trust companies, on the death of the trustee, to pay the amount of the deposit with interest thereon "to the person for whom the deposit was made."⁴¹

In an action by the plaintiff to establish a constructive trust on certain property held by the defendant, the Indiana Court of Appeals, in *Melloh v. Gladis*,⁴² reversed a trial court decree which held that plaintiff was the beneficiary of a resulting trust. Granting a petition to transfer, the Indiana Supreme Court⁴³ held that,

³⁸179 N.Y. 112, 71 N.E. 748 (1904).

³⁹310 N.E.2d at 104. The court further held that if a trust is created by deposits in the manner stated, it does not violate the general rule in Indiana that "use of the words 'trust' or 'trustee' in connection with deposits is not controlling" since "the facts merely create a presumption" of trust "which may be rebutted by a showing that the depositor did not intend a trust." *Id.*

⁴⁰RESTATEMENT (SECOND) OF TRUSTS § 58 (1959); G. BOGERT, TRUSTS AND TRUSTEES § 47 (2d ed. 1965); 1 A. SCOTT, LAW OF TRUSTS §§ 58-58.6 (3d ed. 1967).

⁴¹IND. CODE § 28-1-20-1(b) (Burns 1973) provides in part:

Whenever any deposit shall be made in any bank or trust company by any person which is in form in trust for another, and no other notice of the existence and terms of a valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the deposit or any part thereof, together with any interest thereon may be paid to the person for whom the deposit was made.

⁴²301 N.E.2d 659 (Ind. Ct. App. 1973).

⁴³*Melloh v. Gladis*, 309 N.E.2d 433 (Ind. 1974). The trial court first found a constructive trust, as the plaintiff had alleged, but changed its finding to read "resulting trust." 309 N.E.2d at 439. The basis of the court of appeals' finding that plaintiff had proved a resulting trust is not entirely clear. The court noted that while parol evidence is admissible to establish such a trust, it

although the pleadings and evidence would not support a finding of a *resulting trust*, they were sufficient to sustain a judgment in favor of a *constructive trust*.⁴⁴ In brief, the plaintiff alleged and the trial court found that a deed, absolute on its face, conveyed real property from plaintiff's and defendant's mother to the defendant. This conveyance was made so that the defendant (plaintiff's brother) could administer the family affairs during the mother's declining health. The conveyance was made on the defendant's promise that, upon his mother's death, he would pay to plaintiff "an amount equal to one-half of the value of the property entrusted to his care after the expenses" of his mother's illness and burial were deducted.⁴⁵ The trial court further found that, at the time the defendant made the promise to his mother, he had already formed the intent to keep all the property for his own use and benefit. There was also some indication that the court of appeals was in agreement with the trial court's finding of fact concerning defendant's promise to pay plaintiff one-half of the value of the property in order to obtain title and that, at the time of the promise, he had formed the intent to obtain title and keep the benefits for himself.⁴⁶ The supreme court held that on the basis of these findings the "imposition of a constructive trust is particularly appropriate."⁴⁷ The court further

must be received with caution. The court then proceeded to apply this standard to appellate review, placing considerable weight on the conflicting testimony of plaintiff, defendant, and two witnesses. 301 N.E.2d at 662. If this was the basis for finding no resulting trust, the supreme court stated it was contrary to the ruling precedent of *Friend v. Lafayette Joint Stock Land Bank*, 213 Ind. 408, 13 N.E.2d 213 (1938), which held that, if there is any evidence which fairly tends to establish the facts found, the findings will not be disturbed.

The trial court also found that the promises of the defendant, and his intent to obtain title to the property and keep the benefits, constituted a fraud on the part of the defendant. The court of appeals held that this finding precluded a resulting trust because IND. CODE § 30-1-9-8 (Burns 1972) requires that the agreement giving rise to the resulting trust be free from fraudulent intent. 301 N.E.2d at 662. The supreme court held that the court of appeals erred in this conclusion. The supreme court said that it is necessary to read IND. CODE §§ 30-1-9-6, -7 and -8 (Burns 1972) together. By doing this, it becomes clear that the reference to "fraudulent intent" relative to the purchase money resulting trust in section 30-1-9-8 actually refers back to the presumption of fraudulent intent contained within section 30-1-9-7. This statute is designed to prevent fraud by the grantor or the beneficiary committed individually or in collusion with the grantee. A fraud perpetrated by the grantee to the detriment of the grantor and the beneficiary, the other parties to the agreement, is simply not the concern of the statute. 309 N.E.2d at 438.

⁴⁴309 N.E.2d at 440.

⁴⁵*Id.* at 435.

⁴⁶*Id.* at 437.

⁴⁷*Id.* at 439.

A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the

held that the label attached by the trial court, *i.e.*, a *resulting trust*, should not be determinative. Both resulting and constructive trusts are creatures of equity; to treat this as a constructive trust as alleged in plaintiff's complaint would do more justice.⁴⁸

One of the issues which the Indiana Supreme Court was called upon to decide in *Loeb v. Loeb*⁴⁹ was whether the defendant-husband's beneficial interest in a trust should have been included in the divorce action property settlement. The trial court awarded the plaintiff-appellant a divorce, custody of the minor children and certain property, excluding the defendant's interest in the trust. The court found the beneficial interest of the defendant to be a vested

ground that he would be unjustly enriched if he were permitted to retain it. The duty to convey the property may arise because it was acquired through fraud, duress, undue influence or mistake, or through a breach of a fiduciary duty, or through the wrongful disposition of another's property. The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it.

5 A. SCOTT, LAW OF TRUSTS § 404.2 (3d ed. 1967). In *Westphal v. Heckman*, 185 Ind. 88, 113 N.E. 299 (1916), the court did not find a constructive trust, but made the following statements:

A constructive trust arises in cases where the transaction involved is tainted by fraud, actual or constructive. In such cases, in order to prevent the wrongdoer from reaping a benefit from his fraud, a court of equity will construct a trust such as equity and good conscience requires in order to do justice to the parties affected by the fraudulent transaction. . . .

If the fraud is inherent in the transaction which results in the execution of the deed, such fraud renders the whole contract, including the deed, voidable. When fraud is shown in such a case, the court will not enforce the contract as made, but it will set aside the contract and deed when such a course will meet the ends of justice. If the ends of justice cannot be attained by setting aside the deed, a court of equity will suffer the title to rest in the fraudulent grantee as a trustee *maleficio*, and such a trust will be constructed by the court as will subserve the ends of justice and fair dealing. . . .

. . . .

The finding does not show that at the time the conveyance was made the grantee intended to obtain the title to the land by means of the promise, and then to hold it for his own use and benefit, and that he then had the formed intention of not carrying out his promise. Such facts, if found, would show a fraud inherent in the transaction which would render it voidable from its inception, and which would be sufficient to justify a court of equity in annulling the whole contract and in declaring a constructive trust.

Id. at 97, 113 N.E. at 302-03.

⁴⁸There were other issues, not treated in this case survey, relative to the inadmissibility of evidence under IND. CODE § 34-1-14-7 (Burns 1973) and the admissibility of parol evidence to establish a constructive trust.

⁴⁹301 N.E.2d 349 (Ind. 1973).

remainder subject to complete defeasance.⁵⁰ Recognizing that the wife's interest under a trust, when she is not a beneficiary, can be no greater than her husband's interest, the court concluded that the trial court correctly refused to include the property in the award, referring to it as a "remote interest in property," and one in which the defendant had "no present interest of possessory value."⁵¹ The issue was one of first impression, and the court relied upon authority from without the state but cited no cases involving a vested remainder subject to complete defeasance. However, the court found a sufficient analogy in those cases in which the husband's beneficial interest was a mere expectancy or one subject to the complete and uncontrolled discretion of the trustee.⁵² In each case, the court noted the wife would not be able to reach the beneficial interest to satisfy a claim for alimony and support unless and until the beneficiary had a right to the trust funds. In the opinion of the Indiana court, this should be true of one whose beneficial interest is a vested remainder subject to complete defeasance. It would appear that the court established as a test in such cases not whether the beneficiary has a beneficial interest which has a present value, but rather whether the beneficiary has a present right to beneficial enjoyment.⁵³

⁵⁰In 1955, the defendant's mother created an inter vivos trust reserving unto herself the life income and providing that, on her death, the trust was to terminate with the principal and any undistributed income to be paid over and transferred to Barbara Loeb Alexander, Carol Loeb Wallach, and Edward S. Loeb, the defendant, in equal shares, subject to the following:

In the event any of said principal beneficiaries does not survive the said Gertrude Loeb, then the share of such deceased principal beneficiary shall be paid over, assigned, transferred and delivered to the issue, if any, of such deceased principal beneficiary per stirpes; and in the event such deceased principal beneficiary does not leave issue him or her surviving, then such share shall go in equal portions to the remaining principal beneficiaries

Id. at 352.

⁵¹*Id.* at 353.

⁵²*Meeks v. Kirkland*, 228 Ga. 607, 187 S.E.2d 296 (1972) (the husband's interest was a mere expectancy in his father's Georgia estate); *In re Natts*, 160 Kan. 377, 162 P.2d 82 (1945) (the interest of the husband was subject to the uncontrolled discretion of the trustee); *Shelly v. Shelly*, 223 Ore. 320, 354 P.2d 282 (1960) (the husband's right to corpus was subject to the absolute discretion of the trustee); *Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961) (the husband had no present interest); *Storm v. Storm*, 470 P.2d 367 (Wyo. 1970) (the husband's interest was an expectancy of inheriting a one-half interest in his father's ranch if he survived until the trust ended).

⁵³After recognizing the wife's interest could never be greater than her beneficiary husband's interest, the court stated, "She cannot reach his beneficial interest to satisfy a claim for alimony or support unless and until he has rights to the trust funds." 301 N.E.2d at 353.

XV. Workmen's Compensation

John F. Vargo*

In *Motor Dispatch, Inc. v. Snodgrass*,¹ the Indiana Court of Appeals affirmed the decision of the full Industrial Board which awarded compensation to plaintiff on the basis of the "dual employer doctrine."² An employee of Austin was killed while operating Austin's truck, which was leased to Motor Dispatch, Inc. The tripartite agreement provided that the truck was in the exclusive control, possession and management of Motor Dispatch. Motor Dispatch also had the power to stop the truck and remove the driver. The court stated that the decisive test of the employee-employer relationship is the right to control the means, manner or method of performance and recognized that this control could be exercised in a mixed manner by two employers and that neither employer need have complete control over the employee. Although the court found that both Austin and Motor Dispatch were employers, it remanded on the question of the extent of each employer's liability.³

In *Motor Dispatch*, the court premised the dual employer rule on the common law interpretation of respondeat superior as applied to the general employer-special employer relationship. The general employer-special employer relationship, sometimes called the loaned servant doctrine,⁴ arises when a general employer loans his em-

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¹301 N.E.2d 251 (Ind. Ct. App. 1973).

²Although the court refers to the relationship of Austin and Motor Dispatch as dual employers or co-employers, this may be somewhat inaccurate. Dual employment occurs when an employee is under contract with two employers, under the separate control of each and under a duty to perform unrelated services for each. The facts indicate that the employee was performing related services for both Austin and Motor Dispatch. In a situation such as this, joint employment would be considered the more accurate definition of the relationship of the two employers. "Joint employment occurs when an employee, under contract with two employers, under simultaneous control of both, simultaneously performs" like or the same services for both employers. 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 48.40, at 8-253 (1973) [hereinafter cited as LARSON]. Joint employment results in both employers being liable to the employee for workmen's compensation, while dual employment may result in separate or joint liability depending on severability. See *id.* § 48.40.

³The court remanded in order to determine the liability of each employer pursuant to IND. CODE § 22-3-3-31 (Burns 1974), which provides that, unless the employers agree upon a different distribution, "such employers shall contribute to the payment of such compensation in proportion to their wage liability to such employees."

⁴See B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 4.13, at 84 (1950) [hereinafter cited as SMALL].

ployee to a special employer. The sole issue in cases such as *Motor Dispatch* is the factual question of which employer owes compensation to an injured loaned servant. Therefore, the *Motor Dispatch* court's utilization of the respondeat superior doctrine to determine compensation liability seems inappropriate. Respondeat superior focuses on the tort liability between an employer and third parties,⁵ whereas workmen's compensation focuses on the liability between the employer and employee.⁶

Furthermore the court's application of the dual employer doctrine to trip-lease agreements creates inescapable conflicts. For example, the Workmen's Compensation Act requires a "contract for hire" between the employer and employee;⁷ however, trip-lease agreements appear to be made only between general and special employers. Judicial attempts to imply an employment contract between an employee and special employer serve to deprive the employee of his common law right to sue the special employer for negligence.⁸ Moreover, the implication of an employment relationship does not resolve the problem of distributing the liability between the two employers. For example, Indiana Code section 22-3-3-31 provides that, absent any arrangement, dual employers are liable for an amount proportional to the wages which they pay to the employee.⁹ However, when an employment relationship is implied, it is probable that the special employer has not made direct wage payments to the employee. Sole liability, therefore, would be placed upon the general employer despite the finding of dual employment. If the dual employment test is to be effective, the courts must examine the rationale underlying the Workmen's Compensation Act. One possible solution would be for the courts to determine initially the "contract for hire" requirement before they apply the "right of control" test.

In *Pirtle v. National Tea Co.*,¹⁰ the court found the written notice requirement of Indiana Code sections 22-3-3-1 and 22-3-3-2¹¹ satisfied by mere employer knowledge of an employee injury. The claimant-appellant, Pirtle, injured his back on Friday, but did not report the injury to his foreman until the following Monday or Tuesday. Although the foreman refused to fill out an accident report form, the employer's file contained some information concern-

⁵See *Gibbs v. Miller*, 283 N.E.2d 592 (Ind. Ct. App. 1972); W. PROSSER, *THE LAW OF TORTS* § 69, at 458-60 (4th ed. 1971).

⁶See SMALL § 1.1, at 1-3.

⁷IND. CODE § 22-3-6-1(b) (Burns 1974).

⁸Once the employment relationship is established, *id.* § 22-3-2-6 would deprive the employee of his right to sue in negligence.

⁹See note 3 *supra*.

¹⁰308 N.E.2d 720 (Ind. Ct. App. 1974).

¹¹IND. CODE §§ 22-3-3-1, -2 (Burns 1974).

ing Pirtle's accident. After consideration of the above facts, the Industrial Board denied compensation because of the lack of proper written notice to the employer.¹²

The *Pirtle* court stated that the written notice requirement would be satisfied if the employer has actual or imputed knowledge of the injury. Further, the absence of knowledge by the employer does not bar the employee's claim unless the employer can show resulting prejudice.¹³ Assuming the requisite prejudice is shown by the employer, the claimant's rights to compensation will be impaired only to the extent of such prejudice.

The court of appeals, in *Wolf v. Plibrico Sales & Service Co.*,¹⁴ reversed the Industrial Board's decision denying compensation for claimant's back injury. Wolf claimed that he injured his back while working in a bent position as he repaired industrial furnaces. On July 9, 1971, Wolf experienced a sharp pain in his back and reported the incident to his foreman. Wolf and his fellow employees had previously experienced aches and pains in their backs while working in awkward positions. After consulting his family physician, Wolf returned to his employment and worked intermittently until he was hospitalized for a severe lumbosacral sprain. The Industrial Board denied compensation because Wolf had failed to prove an "untoward event" sufficient to satisfy the "accident" requirement of the compensation act.¹⁵

The opinion of the *Wolf* court is significant from the standpoint that it completely avoids any definitive approach to the determination of what constitutes an accident. The court defined the term accident as an "untoward event not expected or designed."¹⁶ This definition is juxtaposed between a requirement of "sudden traumatic violence" and a mere requirement that the claimant allege that he was working for his employer when the disability arose.¹⁷ Attempting to pinpoint the definition, the court stated that an accident requires an "event," but an event can consist of internal exer-

¹²The Industrial Board found two grounds for denying compensation: the lack of notice and the fact that the injury did not arise out of or in the course of employment. The court of appeals resolved the latter issue by finding no evidence to support such a conclusion. 308 N.E.2d at 724.

¹³Most decisions do not attempt to define prejudice. However, prejudice usually consists of either the lack of opportunity to investigate the accident or the lack of opportunity to afford proper medical treatment to the employee. See *Garton v. Kleinknight*, 74 Ind. App. 267, 128 N.E. 770 (1920); *Tillotson v. New York Tel. Co.*, 33 App. Div. 2d 612, 304 N.Y.S.2d 579 (1969).

¹⁴301 N.E.2d 756 (Ind. Ct. App. 1973).

¹⁵The requirement of "accident" in the Workmen's Compensation Act is found in IND. CODE § 22-3-2-2 (Burns Supp. 1974).

¹⁶301 N.E.2d at 764.

¹⁷*Id.*

tion or strain as well as external trauma.¹⁸ Judge Sharp concluded that the facts of *Wolf* fell within the facts, reasoning, and result of *Rankin v. Industrial Contractors, Inc.*¹⁹ *Rankin* contained several propositions which could be relevant to the determination in *Wolf*, including the following: (1) the claimant need not negate other causes of his disability, (2) aggravations of pre-existing conditions are compensable, (3) the claimant need not point to any particular time or place of the accident, and (4) the claimant must show that his work increased the risk of his injury. The inadequacy of *Wolf* lies not in its failure to define "accident," which is an impossible task, but rather in its failure to remand to the Industrial Board for further findings, which findings would possibly avoid the replacement of an agency conclusion with a judicial conclusion.²⁰

One of the more important cases decided during the survey period was *North v. United States Steel Corp.*²¹ In *North*, an employee brought an action against his employer, United States Steel, for punitive damages, alleging *inter alia* that United States Steel wilfully and recklessly violated Indiana Code sections 22-1-1-10 and 22-1-1-11,²² which prescribe the employer's duty to provide a safe place for the employee to work. United States Steel argued that North's tort action was prevented by Indiana Code section 22-3-2-6, which provides that the remedies under the Workmen's Compensation Act are exclusive. North asserted that section 6 was not applicable to situations involving violations of the employer's duty to provide a safe place of employment and, alternatively, that section 6 did not apply to actions brought for wilful and reckless violations of the Employer's Liability Act.²³

The Court of Appeals for the Seventh Circuit rejected both of North's arguments and held that section 6 was the exclusive remedy for an employee injured during the course of his employment. Relying on prior case law and statutory construction, the court stated that the Workmen's Compensation Act specifically abolishes common law actions against an employer and dismissed the action.²⁴

¹⁸*Id.*

¹⁹144 Ind. App. 394, 246 N.E.2d 410 (1969).

²⁰The court's description of the Industrial Board's findings can only be described as a conclusion. Thus, any decision by the court could have been avoided by remanding to the Board for more specific findings. See *Transport Motor Express, Inc. v. Smith*, 311 N.E.2d 424 (Ind. 1974).

²¹495 F.2d 810 (7th Cir. 1974).

²²IND. CODE §§ 22-1-1-10, -11 (Burns 1974).

²³*Id.* §§ 22-3-9-1 *et seq.*

²⁴In support of its holding that the Act abolished all common law actions, the court cited *Selby v. Sykes*, 189 F.2d 770 (7th Cir. 1951); *Stainbrook v. Johnson County Farm Bureau*, 125 Ind. App. 487, 122 N.E.2d 884 (1954); *Harshman v. Union City Body Co.*, 105 Ind. App. 36, 13 N.E.2d

This simplistic and narrow approach by the court of appeals ignores both the underlying rationale of the compensation laws and the complexities involved in employer-employee relationships. The development of workmen's compensation laws was a result of the inability of the working man to recover against his employer for industrially related injuries.²⁵ This intolerable situation was the primary reason for the abolishment of common law actions against the employer and the substitution of a "no fault" system of recovery.²⁶ Thus, compensation acts were promulgated to include, as a cost of production, the consequences of industrial accidents.²⁷

In *North*, the plaintiff did not allege that an accident occurred, but argued that the employer acted in a wilful manner. Thus, North's action could be considered entirely outside the framework of the Workmen's Compensation Act since the plaintiff's injuries did not fall within the definition of "accident."²⁸ Moreover, the ability to initiate an independent action for wilful employer misconduct is easily justified since the wilful misconduct of an employee is grounds for the denial of compensation benefits.²⁹ Furthermore, it is contrary to the policy underlying the Workmen's Compensation Act to permit employers to insure against intentional wrongs, and thereby escape civil liability, while employees are relegated to partial relief through compensation benefits.³⁰

Pragmatically, the "dual capacity doctrine" establishes a solid justification for permitting North's tort action.³¹ This doctrine is

353 (1938); *In re Bowers*, 65 Ind. App. 128, 116 N.E. 842 (1917); IND. CODE §§ 22-3-2-6, -6-2 (Burns 1974). The court also foreclosed punitive damage actions on the authority of *Burkhart v. Wells Electronics Corp.*, 139 Ind. App. 658, 215 N.E.2d 879 (1966).

²⁵1 LARSON § 4.30 (1972); SMALL § 1.2.

²⁶1 LARSON § 5.20 (1972); SMALL § 1.1.

²⁷See 1A LARSON § 37.10; SMALL § 5.2; Note, *Right of Employee to Sue Employer for an Intentional Tort*, 26 IND. L.J. 280 (1951).

²⁸See SMALL § 5.1 (Supp. 1968).

²⁹IND. CODE § 22-3-2-8 (Burns 1974) describes several types of employee misconduct, including wilful failure to perform statutory duties, which can prevent recovery of compensation benefits. *Id.* § 22-3-2-7 states: "Nothing in this act [*Id.* §§ 22-3-2-1 to -6-3] shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty." Thus, an employee may be deprived of compensation benefits for his failure to perform statutory duties while, according to the *North* holding, the same type of conduct by the employer is not penalized. This type of judicial construction is inconsistent with the general principle of uniformity in statutory interpretation.

³⁰See Note, *Right of Employee to Sue Employer for an Intentional Tort*, 26 IND. L.J. 280, 282 (1951).

³¹For an explanation of the doctrine of dual capacity and a survey of the case law concerning this subject, see Kelly, *Workmen's Compensation and*

steeped in the complex interpositions of contemporary employer-employee relationships. Professor Larson has definitively stated:

Under this doctrine, an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer.³²

In *North*, one of the plaintiff's allegations was that a defect existed in the shop's design. If a third party, rather than the employer, had designed the shop, North could have maintained his action against the third party tortfeasor. However, the *North* court prevented a similar action against the employer-designer due to the exclusivity clause of the Workmen's Compensation Act. By mandate of the "dual capacity doctrine," United States Steel's obligation as the shop designer could be considered so unrelated to its obligations as an employer that it would be subject to tort liability.

Finally, the *North* court completely disregarded the consequences of disallowing punitive damages in an action against an employer who wilfully or intentionally violates safety regulations. In the absence of any effective safety enforcement,³³ an employer can ignore the minimal cost of compensation benefits and continue with impunity to engage in unsafe practices.³⁴ Thus, the holding

Employer Liability: The Dual Capacity Doctrine, 5 ST. MARY'S L.J. 818 (1974).

³²2 LARSON § 72.80, at 226.20 (1974).

³³Although there are several federal and state agencies which attempt to control unsafe industrial conditions, their effect may be minimal. For example, the Occupational Safety and Health Act, 28 U.S.C. §§ 651 *et seq.* (1970) (OSHA), and the Indiana Occupational Safety and Health Act, IND. CODE §§ 22-8-1.1-1 *et seq.* (Burns 1974) (IOSHA), have penalties for unsafe industrial practices. However, the enforcing agencies lack the manpower to properly inspect the large number of businesses in Indiana. OSHA has a staff of ten and IOSHA a staff of fourteen who attempt to inspect approximately 80,000 businesses. In fiscal year 1974, OSHA made 1,115 inspections and it is estimated that less than two percent of Indiana businesses will be inspected annually. See Nussbaum, *Hoosier Firms Must Pay Millions to Correct Deficiencies in Safety*, The Indianapolis Star, July 7, 1974, at 1, col. 4.

³⁴It is very unlikely that an employer, faced with enormous expense, would voluntarily alter his business in order to provide a safe place for an employee to work. For example, assume the following facts. An employer owns an unsafe machine costing several million dollars. In order to sustain his business, he must continue to operate the machine. Its unsafe condition does not interfere with its efficiency; however, its condition is dangerous to the employees. While it would cost several hundred thousand dollars to repair the unsafe condition of the machine, the maximum cost of compensation for injury or death to an employee is only thirty thousand dollars. In such a situation, although the thought processes of the employer may not amount

in *North* could foster industrial disconcern for minimal safety standards, thereby increasing the likelihood that industrial accidents will be more frequent occurrences. Hopefully, a different conclusion would result if the same issue should confront the Indiana Supreme Court.

to a cold calculation of mere costs when considering the safety of his employees, cost must be a factor that would at least subconsciously influence his choice.

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